

corp.
A 700.14 67. ct
DIGEST

OF THE

Laws of England.

BY

THE RIGHT HONOURABLE

SIR JOHN COMYNS, KNIGHT,

LORD CHIEF BARON OF HIS MAJESTY'S COURT OF EXCHEQUER,

THE FOURTH EDITION, CORRECTED,
AND CONTINUED TO THE PRESENT TIME,
By SAMUEL ROSE,

BARRISTER AT LAW, OF LINCOLN'S INN.

IN SIX VOLUMES.

VOL. II.

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

FOR T. N. LONGMAN AND O. REES, G. G. AND J. ROBINSON, T. CADELL,
BROOKE AND RIDER, W. OTRIDGE, J. BUTTERWORTH, J. WALKER,
CLARKE AND SON, AND R. BANISTER.

1800.

S
UK
903
COM



FILMED

JUL 8 1936

RPI PROJECT

NOV 4 1936

Charles Wolcott

BANKRUPT.

(A) Who may be a Bankrupt.

BY the *st.* 13 *Eliz.* 7. if any person, using a trade, or seeking a living by buying and selling, become bankrupt, the lord chancellor, on complaint, &c. shall, by commission assign such, &c. who at discretion may take order with the body, lands, and goods of the offender for satisfaction of his creditors, rate and rate-like, &c.

By the statutes 13 *Eliz.* 7. 1 *Jac.* 15. and 21 *Jac.* 19. a bankrupt may be, every one, who uses the trade of merchandise, or seeks his or her trade of living, by buying and selling.

[Whether a man be a trader within the several statutes against bankrupts, is a question, not of *fact*, but of law upon the *fact*. *Cowp.* 752.]

[Drawing and re-drawing bills of exchange may, or may not amount to a trade in merchandise; but it depends on circumstances. *Ibid.* 751.]

[A person in the county drawing on his banker in *London*, for the purpose of discharging a particular debt, and directing him to re-draw on him for the same amount, does not subject himself thereby to the bankrupt laws. *Id. ibid.*]

[Nor, will merely drawing bills on a person's own account, and borrowing *accommodation* notes, in lieu of his own, to the same amount, make him an object of these laws. *Id.* 745.]

[But where two persons, who have large sums of other people's monies in their hands, are in a course of drawing and re-drawing on each other for the amount of such sums, *that* is a trafficking in exchange, tho' no commission be allowed on either side, and tho' a loss may accrue to the party, for the intention was visibly to make a profit of such exchange. 1 *Atkyns*, 128. *Cowp.* 751.]

[A clergyman may be a bankrupt. *Semb. ex parte Meymot*, *M.* 1747, 1 *Atkyns*, 196.]

[A person may act as a banker, (consequently be a bankrupt,) tho' he does not keep an open shop. *Ex parte Wilson*, *M.* 1752, 1 *Atkyns*, 218.]

[A public officer, as an exciseman, if he trades. *Highmore v. Molloy*, *M.* 1737, 1 *Atkyns*, 206.]

[A pawnbroker, under *st.* 5 *G.* 2. *Ibid.*]

Tho' it be a very inferior trade, if he gets his living by it. *Brewer.*

Dyer. 2 *Cro.* 585.

[Artificers whose living is substantially gotten by mechanical labour, with a mixture of buying and selling; as, a butcher. *Dally v. Smith*, H. 8 G. 3. 4 B. M. 2148.]

[It depends on the proportion of their trade in the different capacities. *D. per Wilmot, C. J. Buscall v. Hogg*, M. 11 G. 3. 3 Willf. 146.]

Tho' he does not sell the same wares which he buys, but converts them to saleable commodities, and then sells.

As, a shoemaker. *R. Cro. Car.* 31. *Cro. El.* 268. *Skin.* 292.

An ironmonger, locksmith.

A salesman.

A clothier, who buys wool, and converts it to cloths.

A tanner, and baker. 3 *Mod.* 33c.

[Whether a vintner as *such* can be a bankrupt, has not been determined. *Per* *Ld. Mansfield*, 4 *Bur.* 2066, but it seems in analogy to the case of victuallers and innholders. (*Vid. B.*) he cannot.]

[But it has been ruled that if he sell as a wine merchant he may. *Vide* 1 *Brown's Ch. Rep.* 178.]

Tho' he has left off his trade for some time, if he absconds, &c. for debts contracted during his trade. *Adm.* 1 *Sid.* 411. *Semb.* 1 *Lev.* 17. *R. Pal.* 325.

Or, for debts contracted in his trade, tho' newly secured after his leaving off his trade.

Or, if he leaves off his trade, but puts his stock into the hands of another, with whom he is partner in gain and loss. *R. Pal.* 325.

Or, if he has effects of his trade in his hands, and upon credit of them contracts debts, tho' he does not buy more goods. *R.* 1 *Vent.* 166.

So, a *feme-covert* merchant may be a bankrupt. [*Ex parte Carrington*, M. 1739, 1 *Atkyns*, 206. *Lavie v. Philips*, M. 6 G. 3. 3 B. M. 1776.]

By the *st.* 21 *Jac.* 19. an alien, or denizen, may be a bankrupt as well as a subject.

By the *st.* 21 *Jac.* 19. a scrivener, receiving others' money, or estates into his trust, or custody.

[It is doubtful whether the clause of 21 *Jac.* 1. whereby a scrivener may be a bankrupt, is not repealed by 10 *Ann. c.* 15.; but a scrivener is implied in the clause of 5 G. 2. c. 30. relating to bankers, brokers, and factors, and may certainly be a bankrupt. *Ex parte Burchal*, H. 1742, 1 *Atkyns*, 141.]

So, a subject who travels, and in a foreign realm trades hither. *R.* 1 *Sal.* 110.

So, a man who trades in *Ireland*, and sometimes in *England*. 2 *Ver.* 162.

Qu. If only beyond sea? 2 *Ver.* 162.

[If a person carries on trade in a kingdom belonging to the crown of *Great Britain*, where the bankrupt acts are not adopted, (as *Ireland*), and comes over here, a commission may be taken out if he has contracted debts here. *Ex parte Williamson*, H. 1750, 1 *Atkyns*, 82. *Cowp.* 398.]

[A person who has dealt merely in running and smuggling goods, though it is an offence, and contrary to an act of parliament, is still
a trader

a trader within the meaning of the bankrupt statutes, and as such liable to a commission. 1 *Atk.* 196.]

[A person residing in *India* and trading there, and in the course of that trading drawing bills upon *England* for the value of other bills sent thither, upon which he got a profit by the exchange, and in the course of that sort of dealing contracting debts in *England*, is a trader within the meaning of the bankrupt laws, and a commission of bankrupt may issue upon an act of bankruptcy committed by him in *England* after he had quitted *India*. *Inglis v. Grant*, B. R. H. 34 Geo. 3. 5 T. R. 530.]

(B) Who not.

BUT a man cannot be a bankrupt by buying and selling, if his principal means of living be not gained by it: and therefore, a farmer, tho' he buys beasts, &c. and afterwards sells them, cannot be a bankrupt; for his principal means of living is by his labour, and not by his buying and selling. *Cro. Car.* 579. By the *st.* 5 Ann. 32. *Per Holt*, 1 *Sal.* 110. *Per two J.* 2 *Mod. Ca.* 48. [*Cowp.* 750.]

[If a man exercise a manufacture from the produce of his own land, as a necessary or usual mode of enjoying that produce, and bringing it advantageously to market, he shall not be considered as a trader, tho' he buy the necessary ingredients and materials to fit it for market. *Per Ld. Mansfield*, 1 *Term. Rep.* 38.]

[As, where a farmer makes cheese on his own land, and buys runnet and salt. *Id. ibid.*]

[Or, makes his own apples into cyder, tho' there be an expence attending the operation, and many things be necessary to be bought, and some mixture. *Id. ibid.*]

[So, in the case of a proprietor of alum works, where the operation tho' complex is necessary to bring the produce of the land to market. *Id. ibid.* and 1 *Brown's Ch. Rep.* 174. 176.]

[So, in that of the proprietor of a coal mine, or of a man who buys a coal mine, (without limitation of time or term, yielding rent and a quantity of coals yearly, and power of re-entry for non-payment,) works it and sells the coals. 2 *Wilf.* 169.]

[So, where a man makes bricks only for his own use, or having a small surplus, sells it to a friend. 1 *Brown's Ch. Rep.* 173. 1 *Term Rep.* 39.]

[But where the produce of the land is merely the raw material of a manufacture, and used as such, and not according to the usual mode of enjoying the land; in short, where the produce of the land is an insignificant article, in comparison of the whole expence of the manufacture, there a man is to be considered as a trader. *Ibid.*]

[As, where a farmer took earth from the waste, for which he afterwards paid a consideration, and sold the bricks to all who came for them. 1 *Brown's Ch. Rep.* 173.]

[So, where a man takes a field for the purpose of making bricks for sale, and makes and sells them accordingly. 1 *Term Rep.* 39.]

[Tho' he holds a farm along with the brick ground. *Semb. Id. ibid.*]

[So, a farmer renting 300l. *per annum*, planting divers acres annually with potatoes, and selling them for gain, if he also buys

great quantities of potatoes, hires warehouses for them, and sells them in several markets, may be a bankrupt. *Mayo v. Archer*, P. 8 G. Str. 513.]

[So, if he buy and sell horses with a view to make a profit by them independently of his farm, tho' the instances be few. 1 Term Rep. 573.]

Nor, an husbandman, or labourer. *Cro. Car.* 31.

Nor, an innholder. *R. per three J. Berkly cont. Cro. Car.* 549. *R.* 3 Mod. 329. 3 Lev. 309. *Jon.* 437. *Carth.* 150. 1 Sal. 109. *Skin.* 291. *Sho.* 96. 269. [*quatenus* innholder. 4 Bur. 2064.]

[But an innkeeper who sells liquor out of the house to all customers applying for it, may, however inconsiderable the extent of such dealing and the profits arising from it may be. 1 Term Rep. 572.]

[Nor, a victualler. *Saunderson v. Rowles*, P. 7 G. 3. 4 B. M. 2064. *Perkin v. Proctor*, T. 8 G. 3. 2 Wilf. 382.]

Nor, the master of a boarding-school. 3 Mod. 330.

Nor, a gun-founder; for he works for the service of the army. *Skin.* 292.

Nor, by the *st.* 5 Ann. 22. a grazier or drover. [*Mills v. Hughes*, C. P. M. 19 Geo. 2. *Willes*, 588.] *Cont.* before. *Jon.* 304.

So, a man who lives by buying only, and not selling, cannot be a bankrupt.

Or, by selling only.

So, if a man has a particular employment, in which he buys and sells, he cannot be a bankrupt, unless it be a general trade: as, if a man purchase and sell lands.

If he victuals the navy. *R.* 1 Vent. 270. *D.* 1 Sal. 110.

If he be a butler, steward to the king, inns of court, &c. *Skin.* 292.

A farmer of the customs, excise, &c. or by the *st.* 5 Ann. 22. the receiver general of the taxes.

Tho' he buys several things by this means, and sells the surplus, or part of them again. 1 Vent. 270.

So, a trader cannot be a bankrupt for debts contracted after he has left off his trade. *R.* 1 Sid. 411.

Tho' he afterwards becomes a trader again. 1 Sid. 411. 1 Lev. 17.

Tho' after leaving off his trade, he sells his old stock. *R.* 1 Sid. 411. 1 Vent. 29.

[But a debt contracted before the party entered into trade may be the ground of a petition for a commission of bankruptcy. *Doug.* 295.]

[The executor of a trader who only disposes of his testator's stock, or buys wines only to fine testator's stock, is not a trader, or liable to commission of bankrupt. *Ex parte Nutt*, T. 1743, 1 Atkyns, 102.]

By the *st.* 14 Car. 2. 24. none shall be a bankrupt for his stock in the *East-India* or *Guinea* Company, or fishing trade, or for selling his dividend received therein in goods, &c.

And by the *st.* 9 & 10 W. 3. 14. no member of the *East-India* Company, in respect of his stock therein only.

So, if a man has a part in a ship; it does not make him a bankrupt, unless he freights it. 1 Sid. 411. 1 Vent. 29.

Or, if he freights it, when he does not get so much as is due upon the bottom for repairs. *R. 1 Sid. 411. 1 Vent. 29.*

If a man commits an act of bankruptcy, and afterwards pays, or compounds with all his creditors, he will be a new man. *R. 1 Sal. 110.*

[An infant. *Ex parte Sydebotham, T. 1742, 1 Atkyns, 146.*]

(C) Act of Bankruptcy.

(C 1.) What shall be.

(C 1.) *Concealment of himself.* [A Trader may be a bankrupt tho' solvent, and insolvent without being a bankrupt. *Doug. 92.*]

By the *st. 13 El. 7.* and *1 Jac. 15.* if any, &c. depart the realm of intent to defraud his creditors being subjects, or for the same intent begin to keep his house, or otherwise absent himself; or depart from his dwelling-house, or take sanctuary, whereby a creditor, being a subject, may be defeated or delayed of his just debt, he shall be adjudged a bankrupt.

And if he has no constant dwelling, if he absents himself from his usual abode.

If a miller keep himself within his mill.

A churchwarden within the church.

And therefore, if a man absent himself from his house, or abode, for debt;

Or, abscond within his house for a day, or an hour, with design to defraud or delay his creditors. *R. Pal. 325.*

[If a man ride out, returns in the evening, before which a bailiff had been to arrest him, next morning he tells him he went out to gain the term of plaintiff, but will now give bail on a new writ, which he does; it is an act of bankruptcy under *1 Jac. 15. Maylin v. Eyles, T. 2 G. 2. Str. 809.*]

[If a man is arrested, and the bailiff takes his word to put in bail, and he keeps at home to avoid the consequences, it is an act of bankruptcy. *Barnes, 160.*]

Or, denies himself, when he knows that a creditor comes for his debt; he will be a bankrupt.

Or, upon notice of process, or execution against him for debt.

Or, process out of Chancery, upon a decree for payment of a debt.

Tho' the concealment of himself be only for a little time. *Pal. 325.*

Or, he be sued only as surety for another. *Pal. 325.*

Otherwise, if he absent himself, or abscond for other cause than to defraud or delay creditors: as, if it be to avoid an arrest upon an *excommunicato capiendo*.

Or, to avoid the service of process to enforce a decree in Chancery.

[Or, to avoid an attachment on an award, for non-delivery of goods pursuant to the award, it is not an act of bankruptcy, for it is not a debt, but a duty only, and so not within the act *1 Jac. c. 15. Lingwood v. Eade, H. 1747, 1 Atkyns, 196.*]

So, if he absconds sometimes for debt, but afterwards appears publickly

publicly and openly for the most part, in his shop, and upon the exchange. *Semb. Cro. El. 13.*

[Denying himself to a creditor at eleven o'clock at night is not an act of bankruptcy. *Ex parte Hall, M. 1753, 1 Atkyns, 201.*]

So, if he absconds, and afterwards goes beyond sea and trades; for this is evidence that his first concealment was not to avoid creditors. *1 Sal. 110.*

[But it seems that such absconding, if attended by a misrepresentation to a creditor by the party's desire is an act of bankruptcy. *Vid. Cowp. 446.*]

[So, a merchant going to his estate in *Barbadoes*, with the knowledge of his creditors, and seeing them daily, and afterwards remitting money to them, shall not be a bankrupt five years afterwards, because a servant proves he was denied to one or two of those creditors. *Ex parte Guffman, 1 Atkyns, 193 and 139.*]

Yet if he trades *de novo* after a manifest act of bankruptcy, this does not purge his bankruptcy. [*1 Salk. 110.*]

[In order to constitute an act of bankruptcy, the debtor *must be denied* to a creditor, with intent to defraud and hinder that creditor; "keeping house" with that intent is not alone sufficient. *Garret v. Monk, E. 3. 4 G. 3. 5 T. R. 575.*]

[In order to constitute an act of bankruptcy by a trader in departing from his dwelling-house, it is not alone sufficient that a creditor should be thereby delayed, but the departure must also have been with that intent. *Fowler v. Padget, B. R. H. 38 G. 3. 7 T. R. 509.*]

[The word "*or*" in the statute of the 1 Jac. 1. c. 15. must be read "*and.*" *Ibid.*]

[It is not sufficient, in order to constitute an act of bankruptcy, that a sheriff's officer, who comes to levy a *feri facias* on a trader's effects, is refused admittance after the trader has left his house, an actual delay and an intent to delay are both necessary. *Barnard v. Vaughan, B. R. H. 39 Geo. 3. 8 T. R. 149.*]

(C 2.) *Fraudulent arrest, &c.*] So, by the *st. 13 El. 7.* and 1 Jac. 15. if any, &c. suffer himself wilfully to be arrested for money not due, for goods, or other just cause, or suffer himself to be arrested, or yield himself to prison, of intent to defraud or hinder creditors, he shall be adjudged a bankrupt.

So, by the *st. 1 Jac. 15.* if any fraudulently procure himself to be arrested, or his goods, money, or chattels, to be attached, or sequestered.

And therefore, if he become a prisoner in the *Fleet* or *Marshalsea*, he will be a bankrupt.

So, if he caused a voluntary or feigned action to be commenced against him.

But he is not a bankrupt if his goods are attached, or sequestered without his procurement: as, upon an attachment out of a court for his default, or laches.

So, if *A.* has a rectory impropriate, and the tythes are sequestered for not repairing the chancel.

[But a fraudulent judgment and execution, tho' void against creditors, is not in itself an act of bankruptcy. *Cowp. 427.*]

(C 3.) *Continuance in prison.*] So, by the *st.* 1 *Jac.* 15. if any, arrested for debt, shall after the arrest lie in prison six months, (or by the *st.* 21 *Jac.* 19. two months,) or more, upon that or any other arrest, or detention in prison for debt, he shall be adjudged a bankrupt.

Tho' the debt be of what value soever, for which he shall be arrested.

Tho' bail be given at first, and he lies in prison afterwards, but not immediately upon the arrest. *Ray.* 481. 1 *Sal.* 109.

[Where a debtor gives bail on an arrest, and afterwards surrenders himself in discharge of his bail, and then lies in prison two months, he becomes a bankrupt from the time of his going to prison, not from the time of his arrest. *Tribe v. Webber, C. P. E.* 17 G. 2. *Willes,* 464. *Infra,* (C 9.)]

But the arrest must be lawful; and therefore, if he be arrested by an executor before probate, it does not make him a bankrupt. *R.* 3 *Lev.* 58. 1 *Vent.* 370.

[If *A.* pays *B.* part of consideration-money for the equity of redemption of his estate, and *B.* refuses to proceed, *A.* arrests him, and *B.* lies two months in prison; this is not foundation for a commission, for no action at law could in strictness be maintained, but a bill for performance. *Ex parte Hylliard, T.* 1751, 1 *Atkyns,* 147.]

(C 4.) *Fraudulent outlawry.*] So, by the *st.* 13 *El.* 7. and 1 *Jac.* 15. if any, &c. shall suffer himself to be outlawed.

But an outlawry in *Ireland* does not make one a bankrupt.

Nor, outlawry here, unless it be with intent to defraud creditors. *Semb.* 1 *Lev.* 13.

Or, if it be reversed before the commission issues.

Or, reversed, for default of proclamations after the commission.

(C 5.) *Non-payment, &c. after suit.*] So, by the *st.* 21 *Jac.* 19. if any, &c. being indebted to any person or persons in 100*l.* or more, shall not pay or compound for the same in six months after it shall grow due, and he be arrested for the same; or in six months after an original sued for the same debt, and notice of it given to him, or left in writing at his dwelling-house or last place of abode, he shall be a bankrupt.

Tho' he be arrested by process out of the *Exchequer*, and the suit be not by original.

But by the *st.* 10 *Ann.* 15. this description of a bankrupt after 20 *April* 1712, is void and repealed; provided, no act, sale, or disposition of any bankrupt's estate upon the said description, by force of a commission before the said 20 *April*, shall be avoided.

(C 6.) *Escape, or covinous bail.*] So, by the *st.* 21 *Jac.* 19. if any, &c. being arrested for 100*l.* or more of just debt, shall after such arrest escape out of prison, or procure his enlargement by putting in common or hired bail.

But now, by the *st.* 10 *Ann.* 15. every act which relates to the description of a bankrupt by procuring his enlargement by common and hired bail, is repealed from the 20 *April* 1712; provided, not to avoid any act, sale, or disposition, &c. on a commission taken out before.

(C 7.) *Protection, or bill for delay.*] So, by the *st. 21 Jac. 19.* if any, &c. by himself or others, with his procurement, obtain any protection, unless a person lawfully protected by the privilege of parliament.

Or, shall prefer to the king, or any of the king's courts, any petition or bill against any of his creditors, to enforce them to accept less than the just and principal debt, or to procure a longer day of payment than was given by the original contract, he shall be adjudged a bankrupt.

But if the creditors, upon request, enlarge the time for payment, it does not make him a bankrupt.

So, if any one be protected as the king's servant. *R. Skin. 21.*

(C 8.) *Fraudulent conveyance.*] So, by the *st. 1 Jac. 15.* if any, &c. shall make or cause to be made any fraudulent grant, or conveyance of his lands or goods, whereby creditors, being subjects, may be defeated or delayed, he shall be judged a bankrupt.

And therefore, if he makes a grant, or conveyance fraudulent within the *st. 13 El.* or the *st. 27 El.* it makes him a bankrupt. *Vide* what conveyances are fraudulent within these statutes, *Cavin*, (B 2, &c.)

[If a trader executes conveyance of his whole substance to a particular creditor, tho' by way of security, and for a valuable consideration, but does not deliver possession till he resolves to commit an act of bankruptcy, it is fraudulent and an act of bankruptcy. *Worsley v. Demattos*, H. 31 G. 2. 1 B. M. 467. *Wilson v. Day*, T. 32 & 33 G. 2. 2 B. M. 827.]

[If he conveys and delivers possession of *all* to one creditor, just before he commits an act of bankruptcy, it is fraudulent. *Ibid.* *Doug. 87.*]

[So, tho' such assignment is only of *one third* of his stock. *Ibid.*]

[Or, even if he colourably reserves a part. *R. per Hardwicke C. in Gayner's Case*, 1 Burr. 477.]

And if he makes a fraudulent grant, &c. he will be a bankrupt, though he afterwards appears publickly upon the exchange, &c. *Semb. cont. Hutt. 42.*

[So, where a trader being solvent at the time, and continuing so for three years after, made a conveyance of all his goods, chattels, and personal estate, to secure a sum of money borrowed; this was held to be an act of bankruptcy by the court of B. R., tho' the chancellor thought otherwise. 1 *Brown's Ch. Rep.* 99. *B. R. Hil. 24 Geo. 3. Doug. 89.*]

[So, an assignment, by deed, of a lease, part of a bankrupt's estate, in contemplation of an act of bankruptcy, is itself an act of bankruptcy. *Doug. 86.*]

[And a parole assignment of only *part* of a trader's stock, in contemplation of an act of bankruptcy, tho' no act of bankruptcy, is void against creditors. *Ibid. 87.*]

[If a trader execute a bill of sale of all his stock and effects, to pay certain creditors, the overplus, if any, to be accounted for to himself, this is an act of bankruptcy. *Doug. 295.*]

[But those who are privies, and assent to a deed of assignment by a debtor,

a debtor, cannot set it up as an act of bankruptcy. 2 *Term Rep.* 594.]

[An assignment of all his effects in trust for creditors, in certain proportions, executed by a person while resident in *India*, is not an act of bankruptcy. *Ingalls v. Grant*, B. R. H. 34 *Geo.* 3. 5 *T. R.* 530.]

[Neither is such assignment fraudulent and void in itself, being intended honestly at the time, and assented to by the generality of the creditors. *Ibid.*]

[*A.* having contracted with a canal company to build locks and bridges on the canal as their engineer, purchased timber and other materials for the purpose, which were laid on the company's premises on the banks of the canal; and on the company's advancing money to him, they took a bill of sale of these goods, and a symbolical delivery of them by a halfpenny. Afterwards the company took out execution upon a judgment confessed by *A.*, and the sheriff seized these goods, and *A.* became a bankrupt. It was holden that *A.* had not such a possession of the goods as would enable his assignees to take them within the statute 21 *Jac.* 1. c. 19. s. 11. for the best delivery was made that the nature of the goods would admit of, they being before on the company's premises. And it was holden, that this bill of sale was no act of bankruptcy in *A.* *Manton v. Moore*, B. R. M. 37 *G.* 3. 7 *T. R.* 67.]

[If partners by deed assign all their partnership effects, &c. to trustees for the benefit of their creditors, and some of the separate creditors of one partner do not assent to it, the assignment is fraudulent and void. *Eckhardt v. Wilson*, B. R. H. 39 *Geo.* 3. 8 *T. R.* 140.]

(C 9.) To what Time it shall relate,

If a man becomes bankrupt by continuance in prison for two months after an arrest, or for not compounding within six months, or by a discharge upon common or hired bail, by the st. 21 *Jac.* 19. he shall be adjudged a bankrupt from the time of his first arrest.

[If the act of bankruptcy is lying two months in gaol, he is bankrupt from the first day by relation, so as to set aside all intermediate transactions. *Barwell v. Ward*, H. 1744, 1 *Atkyns*, 260. *Coppendale v. Bridgen*, B. R. T. 32 & 33 *G.* 2. 2 *Burr.* 814.]

[And to vest the property in the assignees from that time. 2 *Term Rep.* 141.]

[Therefore the assignees may maintain an action for money had and received against a person, who, having notice that a commission would be issued against the bankrupt, sold his goods, and paid him the produce before the expiration of the two months. *Id. ibid.*]

So, if after an arrest, he escapes.

If upon an arrest he gives bail, and afterwards is arrested by another, and continues in prison two months, he shall be a bankrupt from the first arrest. *Per Holt*, 1 *Sal.* 111.

So, if upon an arrest he gives bail, and afterwards surrenders himself in discharge of his bail. *Semb. per Holt*, 1 *Sal.* 111. *Vide infra.*

[If a man is arrested in *Kent*, and afterwards brought up to be turned over, and on the road to the judge's chamber is permitted, at his

his request, to call at his attorney's in *London*, and thence is carried to the judge's chamber, bailed, *instantly* there surrendered by his bail in discharge, and *instantly* committed, and lies two months, he is bankrupt from the first arrest. Tho' on a fair and substantial bailing, only from the surrender. *Rose v. Green, H. 31 G. 2. 1 B. M. 437.*]

[But such being out of custody in *London*, is not an escape to make him bankrupt. *Ibid.*]

If a bankrupt gives away his goods, &c. after the commission issues, it will be void. *R. 2 Co. 26. a. Vide post. (D 16.)*

Tho' it be for satisfaction of a just debt. *R. 2 Co. 26. a.*

So, if he makes a gift to a creditor, or a disposition of his goods, &c. after an act of bankruptcy committed, and before a commission granted, the gift, or disposition will be void; for by the *st. 13 El. 7.* the bargain and sale by the commissioners, &c. shall be good against the offender, his wife, heirs, &c. and all claiming under him by any act after he first became a bankrupt. *2 Co. 26.*

But if a man upon an arrest gives bail, and afterwards surrenders himself in discharge of his bail, he shall not be a bankrupt from the first arrest; for the statute shall be intended only where he continues in prison upon the arrest. *R. 1 Sal. 109. Adm. 3 Lev. 58. 1 Vent. 370. Semb. cont. per Holt, 1 Sal. 111. R. acc. 2 Sho. 253. Ray. 479. R. 2 Sho. 512. 525. But per Sho. there dub. per two J. North cont. Skin. 22. R. per totam curiam four J. 2 Skin. 270.*

[Where an act is a clear unequivocal act of bankruptcy, it cannot be explained by any subsequent circumstances. *2 Term Rep. 59.*]

[Therefore where *A.* was denied in the morning, by express orders, to the holder of a bill which was due, it was a complete act of bankruptcy; and could not be purged by his afterwards paying the bill in the same day before five o'clock, tho' by the custom of *London* the payer of a bill has the whole day on which it becomes due till five o'clock to discharge it. *Id. ibid.*]

[But where the act is in itself doubtful it may be explained. *Id. ibid.*]

(D) Commission.

(D 1.) How it issues.

BY the *st. 13 El. 7.* enlarged by the *st. 1 Jac. 15.* and *21 Jac. 19.* the lord chancellor, or keeper, on complaint in writing that any is bankrupt by commission under the great seal shall appoint such as he thinks fit, &c.

But *ex cautela*, the chancellor, before the commission is granted, usually requires a petition of the creditors, and an affidavit that they believe him to be a bankrupt.

And by the *st. 5 Ann. 22.* no commission after *25 April 1707*, shall be awarded on the petition of a single creditor, unless his debt amount to *100 l.* or upwards, or of two creditors, unless their debts amount to *150 l.*, or of three or more, unless their debts amount to *200 l.* or upwards. So, by the *st. 5 Geo. 2. c. 30.*

[Where a commission of bankruptcy is taken out fraudulently or maliciously, the chancellor may, under this statute, order a specific sum by way of damages to be paid by the petitioning creditor to the bankrupt, or assign the bond given by the former to enable the latter to recover

recover the whole penalty. *Smith v. Broomhead, B. R. T. 37 Geo. 3. 7 T. R. 300.*]

[The assignment of the bond by the chancellor is conclusive evidence of the fraud or malice in an action brought on such bond. *Ibid.*]

[It is not necessary to state in a declaration on such bond that the commission was fraudulently or maliciously sued out. *Ibid.*]

[On superseding a commission, the court may either direct an inquiry before a master of the damages sustained by the bankrupt, or a *quantum damnificatus* upon an issue at law, and, after damages are settled, may, for the better recovery thereof, order the bond given by the petitioning creditor to be assigned to the bankrupt. He may also order the bond to be assigned in the first instance, without any such previous inquiry. *Ex parte Gayter, 1 Atk. 144.*]

[On this statute it has been questioned, but not determined, whether a commission be good, being sued out at the petition of three or more creditors, whose debts did not altogether amount to 200*l.* tho' the debt of one was 161*l.*; and it seems it is bad. *1 Term Rep. 481.*]

And before the commission granted, the creditors petitioning shall give bond to the lord chancellor, &c. of 200*l.* penalty, on condition that they prove their debts, and the party a bankrupt; and on failure the bond shall be assigned for the benefit of the party grieved. So, by the *st. 5 G. 2. c. 30.*

The commission ought to be granted *de jure*, upon the petition of creditors, &c. *2 Ca. Ch. 191. 1 Ver. 153.*

[But a second commission taken out, pending a former, under which a bankrupt has not obtained his certificate, is void. And the effects of the bankrupt taken under such second commission belong to the creditors under the first. *Cowp. 823.*]

[Caveats against commissions of bankrupt before they issue ought not to be allowed, tho' there have been some instances of them. *Ex parte Parsons, M. 1746, 1 Atkyns, 72.*]

[A commission may issue to find the party a bankrupt, and to make a provisional assignment, with restrictions not to issue warrant of seizure against effects, nor to summon bankrupt to surrender, till trial at law had, and further directions. *Ibid.*]

[Under a joint commission each partner must be found a bankrupt, and tho' one dies afterwards, the commission may go on; but if one is dead before the commission issues, it is void. *Beasley v. Beasley, H. 1736, 1 Atkyns, 97.*]

[A commission may issue against one partner of three, for a joint debt, tho' an action cannot be maintained against one, without joining the other two. *R. by C. B. unanimously on issue directed. Ex parte Crisp, T. 1744, 1 Atkyns, 133. Willes, 467. S. C.*]

But a commission granted before an act of bankruptcy is completed, will be void: as, after an arrest and imprisonment, and within two months after the arrest. *1 Sal. 111.*

[By the *st. 5 G. 2. c. 30. s. 41.* the lord chancellor shall appoint a proper place near the inns of court, where all proceedings under a commission of bankrupt shall be entred of record, by a person appointed by the lord chancellor, or by the deputy of such person to be approved by the chancellor; and on petition to the chancellor, &c. he

he shall order all proceedings under commissions to be there entred, and all persons shall be at liberty to search and see if such entry be duly made: and in case of the *death* of the witnesses proving the act of bankruptcy, or in case of the commissions and proceedings being lost or mislaid, a true copy of the record may be given in evidence.]

[The depositions of the *act of bankruptcy*, when recorded according to this act (or copies thereof) are *evidence* in an action at law, to prove the *precise time*, if it be specified in them, on the death of the witness. *Doug. 257.*]

By the *stat. 21 Jac. 19.* no purchaser shall be impeached, &c. unless a commission be sued within five years after he becomes bankrupt. *Vide post. (D 18.)*

And therefore, the commission ought to be granted within five years after the act of bankruptcy. *Semb. 1 Lev. 13. 1 Ver. 153.*

But if there are several acts of bankruptcy, it may be granted within five years of the last act. *R. 1 Lev. 13.*

So, it must be granted during the life of the bankrupt, and not afterwards. *2 Ca. Ch. 143. 192. 1 Ver. 153.*

So, by the *stat. 7 Geo. 31.* a creditor, on a security not due before the party becomes a bankrupt, shall not be a sufficient creditor in respect to such debt, to join in a petition for a commission of bankruptcy, until such time as his debt becomes actually due and payable.

[But this is repealed by 5 *Geo. 2. c. 30. s. 23.*]

[The indorsee of a note given before the act of bankruptcy, and indorsed after it, may be petitioning creditor. *Ex parte Thomas, M. 1747, 1 Atkyns, 73. 126. Anon, T. 1 G. 3. 2 Wilf. 135.*]

[The petitioning creditor's debt did not amount to 100 *l.* at the time of the act of bankruptcy, but was increased to a little more than 100 *l.* by a promissory note of the bankrupt due at that time being indorsed to him before he petitioned for the commission: this debt was deemed sufficient to support the commission. *Glaiſter v. Hewer, B. R. H. 38 Geo. 3. 7 T. R. 498. Bingley v. Maddison, B. R. M. 1783, 1 Cooke's B. L. 19.*]

[Creditor by simple contract before act of bankruptcy, taking a bond after a secret act of bankruptcy, may be a petitioning creditor. *Ambrose v. Clendon, P. 9 G. 2. Str. 1042. B. R. H. 267.*]

[If a tradesman becomes *security for another*, it creates such a debt that the creditor may take out a commission against the surety. *Heylor v. Hall, Palm. 325.*]

[A creditor of a bankrupt to the amount of 112 *l.*, previous to the act of bankruptcy receiving 50 *l.* after notice of such act, is not thereby precluded from suing out a commission; for by so doing he waives his claim to the payment, and he may still retain the money in his hands for the credit of the bankrupt's estate. *Man v. Shepherd, B. R. M. 35 Geo. 3. 6 T. R. 79.*]

[A debt on an account not liquidated is a foundation for a commission of bankrupt. *Flower v. Herbert, T. 1751, 2 Vesey, 326.*]

[So, a debt contracted before a man enters into trade. *Butcher v. Easto, B. R. M. 20 Geo. 3. Doug. 295.*]

[But not a debt contracted after leaving off trade. *1 Sid. 411, 1 Ld Ray. 287.*]

[A creditor who has the body in execution, cannot be a petitioning creditor. *Barnaby's Case, M. 11 G. Str. 653. Cohen v. Cunningham, B. R. H. 39 Geo. 3. 8 T. R. 123.*]

Nor,

Nor, he whose debt was contracted after the act of bankruptcy. *Toms v. Mytton*, H. 13 G. Str. 744. *Ambrose v. Clendon*, P. 9 G. 2. Str. 1042.]

[Assignee of a bond cannot be a petitioning creditor, for he is not a legal but only an equitable creditor, and no equitable debt is sufficient. *Medlicot's Case*, P. 4 G. 2. Str. 899. *Ex parte Hylliard*, T. 1751, 2 Vesey, 407.]

[So, neither can a creditor by promissory note of above six years standing. *Acc. Mosely*, 37. Str. 746. *contra*.]

[The executor of a bankrupt cannot take out a commission for a debt due to his testator, for it is vested in his assignees, unless the commission is superseded. *Ex parte Goodwin*, P. 1740, 1 Athyngs, 100.]

[Action on the case lies for falsely and maliciously suing out a commission, notwithstanding the remedy given by statute of assignment of the bond. *Brown v. Chapman*, T. 3 G. 3. 3 B. M. 1418.]

(D 2.) Who shall take Advantage of the Commission.

By the *stat. 1 Jac. 15.* in four months after the commission, and until distribution, &c., any creditors of the bankrupt may join with the creditors who sued forth the commission, those so coming in contributing to the charges of the said commission, and if the creditors come not in within four months, then the commissioners have power to distribute.

And all the creditors may come in before distribution made, tho' four months are passed. *R. Hutt.* 38.

So, by the *stat. 7 G. 3.* a creditor whose bond, bill, note, &c. taken on sale of goods, is payable at a future day.

And till the four months are passed the commissioners cannot make distribution, tho' they may sell and prepare for a distribution presently upon execution of the commission, within the four months. *R. Hutt.* 37.

[By *stat. 5 G. 2. c. 30. s. 33.* the assignee shall at some time after the expiration of four months, and before the expiration of twelve, cause at least 21 days public notice to be given in the *London Gazette*, of the time and place the commissioners and assignees intend to meet to make a dividend, at which meeting the creditors who have not before proved their debts, may then prove the same. And by *s. 37.*, within 18 months after the issuing of the commission, notice shall be given in the *London Gazette*, of a meeting to make a second dividend, in case the estate was not wholly divided on the first dividend, and for the creditors, who have not before proved their debts to come in and prove the same; and this second dividend shall be *final*, unless any suit at law, or in equity, be depending, or any part of the estate standing out, &c.]

And it is sufficient, that the creditors offer to be joined and contributors to the charge, without tending any particular sum. *Hutt.* 38.

So, after a distribution of part, any creditor paying contribution may come in for that which remains. *R. 2 Ca. Ch.* 154.

But an offer of creditors to join with those that procured the commission, is not sufficient, without an offer also to be contributory to the charges. *R. Hutt.* 38. And

And the charges comprehend all expences of the execution and defence of the commission, as well as of the issuing. *Hutt.* 38.

And if the creditors refuse or neglect to come in before distribution made after four months, they shall not be afterwards aided. *R. 2 Co.* 26. *b.*

[But now by *stat. 5 Geo. 2. c. 3. s. 25.* the petitioning creditor shall, at his own costs, sue forth and prosecute the commission, until the choice of assignees, at the time for choosing whom the commissioners shall ascertain such costs, and order them by writing under their hands to be reimbursed to such creditor by the assignees, out of the first monies that shall be got in of the effects of the bankrupt; and every creditor shall be at liberty to prove his debt without any contribution.]

And if distribution be made after the four months of part only, the other creditors come too late. *R. Hutt.* 38. *R. cont.* that they do not come too late for the residue. *2 Ca. Ch.* 154.

And they ought to take notice of the commission, it being of record. *2 Co.* 26. *b.*

[Separate creditors cannot be admitted to prove their debts under a joint commission, without the sanction of the court. *Ex parte Sandon, H.* 1743, 1 *Atkyns*, 68.

Under a joint commission separate creditors may come in, and joint creditors shall be paid out of the joint, and separate out of the separate estate, for the assignment is of the whole estate. *Ex parte Baudier, M.* 1742, 1 *Atkyns*, 98.]

[But where two separate commissions issue against two, as separate traders, tho' they have been partners, there the creditors on the joint estate cannot come in, but must take out a joint commission. *Ibid.*]

[If a separate commission is taken out against persons who were formerly partners, the joint creditors shall be at liberty to bring bill for their demand, on account of the partnership, against the assignees of the separate estate, who shall sell all the effects seized under the commission, and deposit the money in the bank, but make no dividend till the suit is determined; and in the mean time, the joint creditors may prove their debts under the separate commission, without prejudice. *Ex parte Voguel, H.* 1743, 1 *Atkyns*, 132.]

[A creditor is not entitled to pursue the person of the bankrupt, and also to receive a proportionable benefit under the commission. *Ex parte Capot, H.* 1739, 1 *Atkyns*, 219.]

[Petition to prove a debt irregular, because the creditor had not been before the commissioners when it was presented; and because he brought it to a hearing without stating what in the intermediate time had passed before them. *Ex parte Wright, 2 Vesey jun.* 41.]

[A creditor who has brought action, and also proved his debt under the commission, and being the majority in value, chosen himself assignee, may still make his election to proceed at law. *Ex parte Dervilliers, T.* 1751, 1 *Atkyns*, 221.]

(D 3.) Who are Creditors.

By the *stat. 21 Jac. 19.* (tho' not by the *stat. 13 El. 7.* and 1 *Jac. 15.*) alien creditors shall have the same benefit of a commission of bankrupt, as a subject, or denizen. And

And by the same statute, every creditor having security for his debt by judgment, statute, recognizance, specialty, &c. whereof no execution, or extent is served, and executed before such time as he became bankrupt, shall be relieved, &c.

And every creditor having security for his debt, or having no security, &c. or having made attachment of the goods of the bankrupt by the custom of *London*, or elsewhere.

If an executor becomes a bankrupt, the legatee shall be a creditor.

So, a surety for a bankrupt, who has paid the debt. *R. 2 Cro. 127.*

Or, the bail for a bankrupt, who has paid the condemnation.

Or, a debtee, tho' the day of payment is not yet come.

[A creditor having a demand in trover for a liquidated amount, may prove his debt under the commission. *Doug. 168.*]

[But where *damages* are not ascertained *before* the bankruptcy, no debt can be proved, as for an assault, or any personal tort. *Ibid.*]

[Nor, is bankruptcy a *plea* in bar to an action of *trespass* for mesne profits. *Id. 584.*]

[But costs in ejectment incurred before defendant's bankruptcy, may be proved under his commission. *2 Term Rep. 261.*]

[If a plaintiff become a bankrupt after he is nonsuited, and before the taxation of costs, the costs of the nonsuit are a debt proveable under the commission. *Hurst v. Mead, B. R. T. 33 Geo. 3. 5 T. R. 365.*]

[If the cause of action arises before bankruptcy, interest and costs accrued since are proveable under the commission. *Blandford v. Foote, B. R. T. 14 Geo. 3. Corp. 138.*]

[Where a debt arises before bankruptcy, but a verdict is obtained and costs taxed after, the costs are considered as part of the original debt, and the certificate extends to both. *Lewis v. Piercy, C. P. T. 28 Geo. 3. 1 H. Bl. 29.*]

[If *A.* recover a judgment against *B.* before the bankruptcy of *B.*, and revive it by *scire facias* after the bankruptcy, the costs of the *scire facias* relate back to the judgment, and may be proved under the commission. *Phillips v. Brown, B. R. E. 35 Geo. 3. 6 T. R. 282.*]

[So, if a writ of error be brought after the bankruptcy to reverse a judgment against the bankrupt before, and the judgment be affirmed, the costs of the writ of error refer to the judgment, and are proveable under the commission. *Ibid.*]

[If a plaintiff become bankrupt after a nonsuit at *nisi prius*, and before the judgment of nonsuit, the costs are a debt proveable under the commission. *Watts v. Hart, C. P. M. 38 Geo. 3. 1 Bos. & Pull. Rep. 134.*]

So, an executor tho' he has not a probate of the testament before the bankruptcy. *R. 2 Sho. 253. Ray. 479.*

So, by the *stat. 7 G. 3* 1. whereas merchants and traders in goods often sell on credit, and take bills, bonds, notes payable at a future day, all persons who have given, or shall give, credit on such securities to any who becomes bankrupt, on a good and valuable consideration *bonâ fide*, &c. shall be admitted to prove their debts, &c., and to have distribution with a rebate of interest, &c., as if the debt was payable presently, and not at a future day.

[Bonds payable at a future day, tho' not given for goods sold by
a trader

a trader, are within this statute. *Doug.* 165. *Str.* 1211. *Cowp.* 540.]

[For it extends to all *personal* securities for a valuable consideration, where the time of payment is *certain*, tho' *future*. *Cowp.* 540. *Vide Cowp.* 742.]

So, where *S. L.* being arrested for the amount of goods, *E. L.* became bound as surety with him, to procure his discharge, in a bond to the plaintiff, payable by instalments, and before the first default *E. L.* became a bankrupt, the plaintiff is bound to prove his debt under the commission. 1 *Term Rep.* 17.]

[So, if a surety bound with his principal for payment of money by instalments, take a bond from the principal conditioned for payment of the amount before the first instalment will be due, and before that time the principal become bankrupt, and obtain his certificate, and afterwards the instalment bond is discharged by the surety. The certificate is a bar to an action on the counter bond, for he might have proved it under the commission. 2 *Term Rep.* 104. 640.]

[But had the surety not taken a bond, the law would have raised an *assumpsit* in the principal, and the surety might have recovered for money paid to his use, which having taken the bond he cannot do. *Id. ib.*]

[*X.* became bound as a surety with *Y.* to *A.* on the tenth of *August* 1778, conditioned for payment in six months: on the first of *March* 1780, he became bound with *Y.* to *B.*, conditioned for payment in six months; on the fourth of *March* 1780, *Y.* became bound to *X.*, conditioned for payment of the two former bonds, and also to indemnify *X.* against those two bonds; the money secured by the second bond not being paid on the day when it became due, it was holden that the last bond was thereby forfeited, though *X.* was not called upon to pay the money in the second bond until afterwards, and that *X.* might prove it as a debt under the commission of bankrupt that issued against *Y.* after the forfeiture and before payment. *Hodgson v. Bell*, *B. R. H.* 37 *Geo.* 3. 7 *T. R.* 97.]

Creditors by judgment, statute, recognizance, specialty with penalty, &c., attachment, or other security, by the *stat.* 21 *Jac.* 19. shall not be relieved upon such judgment, &c., but for a rateable part of their just debt, without respect to the penalty contained in such judgment, statute, recognizance, specialty, &c. 21 *Jac.* 19.

And by the *stat.* 21 *Jac.* 19. the commissioners may examine any upon oath, or otherwise for the discovery of the truth and certainty of his debt, for which he seeks relief by such commission.

But a mortgagee is not entitled to relief within the statutes of bankrupts; for he may help himself by his mortgage. *Ch. R.* 466.

[And where a father being seised for life, with remainder to the son in fee, they join in a mortgage to raise money for the use of the father, and afterwards the father becoming bankrupt, the mortgagee files his bill of foreclosure, and has a decree on which the premises are sold. The son cannot be admitted to prove the value of his remainder as a debt under the commission, because his debt did not accrue till after the bankruptcy. 1 *Brown's Ch. Rep.* 384.]

[Mortgagee of a bankrupt's estate, tho' he pays arrears of rent due to bankrupt's landlord, unless he applies to the court to stand in the landlord's

landlord's place, in consideration thereof, shall not be preferred to the creditors under the commission. *Anon. P. 1740, 1 Atkyns, 102.*

So, if a bankrupt purchase lands, and part of the money is not paid, the land shall be charged with it. *1 Ver. 267, 8.*

Nor, a man who has goods pledged to him for his money, before the bankruptcy.

[And where a trader pledged a lease as a security for a sum of money borrowed by him, and afterwards became bankrupt, the pledge is protected against the assignees. *1 Brown. Ch. Rep. 269.*]

Nor, a man who lends money to a bankrupt after his bankruptcy, and a commission against him, tho' without notice of it. *Per two Com. Rawlinson, cont. 2 Ver. 157. 161.*

So, a man who has an execution, or an extent served or executed upon the lands or goods of a bankrupt, before he becomes bankrupt, needs no relief by a commission of bankruptcy. *Semb. per ff. 21 Jac. 19. Vide post. (D 20.)*

So, a man who has a bond from A. with condition, that his executors pay 400 l. to B., if she survive two months after his decease, shall not have distribution within the *ff. 7 Geo. 31.*; for perhaps the money will never be due. *Adm. in B. R. and afterwards affirmed in Error, Trin. 3 Geo. 2. Sparks and Tully, 2 Ld. Ray. 1546. 1570.*

[A creditor by bond, who has also an open account with the bankrupt, may prove the bond-debt before the account is settled, which may be settled afterwards, and he is entitled only to the balance. *Ex parte Simpson, T. 1744, 1 Atkyns, 68.*]

[A creditor who has a bankrupt in execution for one debt, may prove a distinct debt against him under the commission, tho' he will not waive his execution for the other debt. *Ex parte Botterill, P. 1746, 1 Atkyns, 109.*]

[One inhabitant of a parish may be admitted to prove a debt for himself, and the rest of the parishioners, for land-tax received by the bankrupt as collector, and not paid in to the receiver-general. *Ex parte Child, H. 1751, 1 Atkyns, 111.*]

[So, for money of the poor in the hands of the bankrupt, as overseer of the poor, if his accounts were, or ought to have been delivered in before the bankruptcy, but not otherwise; for till the time of delivering in his accounts, he is not a debtor to the parish. *1 Term Rep. 369.*]

[If a creditor has taken a distress for rent, knows of the commission, yet lies by for 15 years; when the bankrupt and the assignee are both dead, he shall not be admitted to prove a debt, tho' he pretends he was ignorant of a dividend made nine years before. *Ex parte Peachy, T. 1754, 1 Atkyns, 111.*]

[If a man before marriage gives a bond to trustee, conditioned to leave his wife 300 l., and afterwards becomes bankrupt, and dies insolvent before any dividend made, the wife may be admitted a creditor. *Semb. sed dub. Ex parte Greenaway, M. 1740, 1 Atkyns, 113.*]

[If a man by articles, previous to marriage, covenant to leave his wife 600 l. if she survives him, and becomes bankrupt, and dies before dividend made, the wife cannot be admitted a creditor. *Ex parte Groome, 1744, 1 Atkyns, 115.*]

[The privilege of creditors to come in, and of bankrupts to be discharged from debts, is co-extensive and commensurate. *Ibid.*]

[If the father of the wife gives a bond previous to the marriage, to pay the husband 1000*l.* after the death of himself and wife, and in the mean time interest at 4 *per cent.*, and the bond is forfeited by non-payment of interest, and the father becomes bankrupt, the husband shall be admitted to prove his debt of 1000*l.*, and be paid dividend for it rateably with the other creditors. 1 *Atkyns*, 155. *Winchester's Case.*]

[If husband before marriage contracts with trustees to pay money in his lifetime for her benefit *if she survives*, and if she dies, for children, if no children for his own benefit, and he becomes bankrupt after breach of payment to trustees, they shall be admitted creditors on equitable terms, the interest shall be paid to the creditors under the commission during the husband's life, and the principal secured to the wife if she survives. *Ibid.*]

[So, where the husband, in his marriage settlement, had covenanted to pay to trustees to the uses of the settlement 6000*l.* by instalments, *viz.* 1000*l.* at the end of seven years, and 1000*l.* *per ann.* afterwards, so that the whole should be paid in 12 years, if the husband should so long live; if he should not, then the whole to be paid within one year after his decease, *if the wife, or any child of the marriage be then living*; if not, then 3000*l.* The husband became bankrupt just before the end of the first 7 years: the lord chancellor ordered that the trustees should be admitted to prove the 3000*l.*, that must at all events become due, with a rebate of interest, and of whatever the bankrupt could claim against the trustees. 1 *Brown. Ch. Rep.* 398.]

[If judgment has been given at law by the husband for this sum, it is a debt notwithstanding the defeazance, and the trustees shall be admitted as creditors, tho' the terms of the bond itself be otherwise. *Ibid.* *Ex parte Michel*, *M.* 1751, 1 *Atkyns*, 120.]

[If *A.* draws bills on *B.*, who has no effects in his hands, and *B.* accepts other bills drawn by *A.* on *C.*, who has no effects in his hands, and both *B.* and *A.* become bankrupt, the assignees of *B.* shall be admitted creditors under *A.*'s commission for as much as they pay to the indorsees of *A.*'s bills under *B.*'s commission. *Ex parte Walton*, *M.* 1743, 1 *Atkyns*, 122.]

[*A.* gives a note payable to *B.* in two months for 100*l.*, without consideration, *B.* indorses it to *C.*, allowing 9 *per cent.* discount, when due, *C.* takes joint bond from *A.* and *B.* for 100*l.*, *A.* becomes bankrupt, *C.* shall not be admitted to the dividend, till an issue tried whether the bond is usurious or not. *Ex parte Thomson*, 1 *Atkyns*, 125.]

[By *stat.* 19 *Geo.* 2. *c.* 32. obligees in bottomree or respondentia bonds, and the insured in policies of insurance, shall be admitted to claim, and after the loss or contingency happened, to prove their debts and have their share of dividend, as if loss or contingency had happened before commission issued.]

[If *A.* and *B.* have transactions principally in negotiating bills, and *B.* commits a private act of bankruptcy, after which *A.* pays to *B.* 712*l.*, and *B.* pays to *A.* 3000*l.*, which after the commission, the assignees of *B.* recover at law against *A.*, on a bill brought by *A.* he shall be allowed the 712*l.* *Billon v. Hide*, *M.* 1749, 1 *Atkyns*, 1.6.]

[*A.* draws

[*A.* draws on *B.*, who has no effects, but accepts for the honour of the drawer, both become bankrupt, the bill-holders prove under both commissions, and receive dividends, but not sufficient to pay 20s. in the pound; the assignees of *B.* shall stand in the place of the bill-holders *pro tanto*, as *B.*'s estate has paid on account of his acceptance of the bills, but shall receive no dividend till the bill-holders receive full satisfaction; and if the surplus of *A.*'s estate is not sufficient to answer what *B.* has paid as acceptor, the assignees shall have action against the person of *A.* for the residue, tho' he has had his certificate. *Ex parte Marshal*, 1752, 1 *Atkyns*, 129.]

[*B.* agrees with *A.* to answer all draughts of *C.* on him on *A.*'s account; *C.* draws on *B.*, who accepts tho' he has no effects; on *B.*'s non-payment, *C.* pays it; *C.* shall be admitted a creditor under the commission against *B.* the acceptor. *Ex parte Marshal*, T. 1753, 1 *Atkyns*, 131.]

[An apprentice comes in only as a creditor, and only for the sum remaining after deducting for the time he lived with the bankrupt. *Ex parte Sandby*, M. 1745, 1 *Atkyns*, 149.]

[If husband previous to marriage gives bond to trustees for 600*l.* for the wife's separate use, with power to dispose of it by will, and she appoints it to her children by former husband, they shall come in as creditors, tho' the husband become bankrupt, suggests that he was deceived in his opinion of his wife's fortune. *Ex parte Marsh*, T. 1744, 1 *Atkyns*, 158.]

[If *A.* lends a sum of money to one partner, (who is entitled to the whole partnership stock, and two thirds of the profit,) and he lends it to the partnership trade; and *A.* also deposits bonds for safe custody with him, which he pawns, and lends the money to the partnership trade, and a joint commission issues; *A.* shall not come in immediately and directly with the other partnership creditors, but *by way of circuit* he is entitled, as standing in the place of that partner who has paid the money to the use of the partnership trade. *Ex parte Hunter*, H. 1742, 1 *Atkyns*, 223.]

[If two partners agree to borrow money for the partnership use, and one only gives bond, which the other witnesses, and the money entered in partnership cash-book, the obligee shall be admitted a creditor under a joint commission. *Ex parte Brown*, H. 1745, 1 *Atkyns*, 225.]

[If *A.*, a trader in *Holland*, fails, and has a *cessio bonorum*, and then borrows money in *England* of a former creditor, and gives him bond for the new loan and the old debt, he shall be admitted creditor for the whole. *Ex parte Burton*, M. 1744, 1 *Atkyns*, 255.]

[So, if a bankrupt, after his certificate allowed, applies to a former creditor for a new loan, and gives bond for both, he will be admitted for the whole on a second bankruptcy. *Semb. ibid.*]

[If *A.* being indebted to *B.* assigns a mortgage to him, and becomes bankrupt; the mortgage shall be sold, and *B.* come in as a creditor under the commission, for the deficiency only. *Ex parte Bennet*, H. 1742, 2 *Atkyns*, 527.]

[If *A.* has joint bonds from the bankrupt and another, he may come in for the whole debt under the commission, without delivering

up the bonds, as he has a right to get in what he can from the co-obligor. *Ex parte Bennet, H. 1742, 2 Atkyns, 527.*]

[But *qu.* Whether if the bankrupt has deposited bonds from third persons to him, as a further security to *A.*, he can be admitted a creditor for the whole debt, without delivering up the bonds? *Ibid.*]

[A person may prove a debt in right of his wife, and yet bring an action at law for a debt due to him in his own right. *Ex parte Matthews, M. 1754, 3 Atkyns, 816.*]

[On an usurious contract, the whole debt is void, and the assignees are not obliged to pay even what is really due. *Ex parte Skip, T. 1752, 2 Vesey, 489.*]

[A father with whom a child lived and was maintained, and who received the earnings of the child, becoming bankrupt, the child may be admitted a creditor, but with caution. *Ex parte Macklin, T. 1755, 2 Vesey, 675.*]

[*A.* draws on *B.* promising to indemnify him, he accepts, bill becomes due, then *A.* becomes bankrupt, then *B.* is sued and charged in execution. He cannot come in as a creditor, for the debt accrued till he was charged in execution, which was after the bankruptcy. *Chilton v. Wiffin, T. 8 G. 3. 3 Wilf. 13.*]

[If a demand be payable at *all events*, tho' at a future day, it may be proved under the commission; but if it rest in *contingency* whether it will be paid or not, it cannot be so proved, unless it be secured by a penalty which is forfeited at law. *Hancock v. Entwistle, B. R. M. 30 Geo. 3. 3 T. R. 435.*]

[*A.* draws a bill of exchange on *B.* in favour of *C.*, who indorses it to *D.*, who discounts it. *Before the bill is due A. becomes a bankrupt, and obtains his certificate.* When the bill is due, payment is refused; upon which *C.* refunds the money to *D.*, which was advanced in discount, and takes back the bill. To an action brought by *B.* against *A.* on the bill, *A. cannot plead his bankruptcy.* *Brooks v. Rogers, C. P. E. 3. Geo. 3. 1 H. Bl. 640.*]

[The debt and costs on a bail-bond, (tho' increased by two writs of error,) paid for a bankrupt on a promise of indemnity, are not covered by the commission, the same not having been paid till after the bankruptcy, tho' judgment on the bail-bond was had before. *Goddard v. Vanderheyden, C. P. M. 12 Geo. 3. 2 Bl. 794. 3 Wilf. 262. S. C.*]

[A right of action on a breach of covenant not secured by a penalty, and where the damages to be recovered are uncertain, is not barred by the defendant's certificate, who became a bankrupt after the covenant was broken. *Banister v. Scott, B. R. M. 36 Geo. 3. 6 T. R. 489. Vide infra, (D 34.)*]

[*A.* sold a ship to *B.*, with a covenant that he had a good title, tho' in fact he had none; afterwards *A.* became a bankrupt, and *B.* sustained damage by paying the value of the ship to the true owners; and it was holden in an action of covenant by *B.* against *A.*, stating the special damage, that *A.*'s certificate was no bar. *Hammond v. Toulmin, B. R. E. 38 Geo. 3. 7 T. R. 612.*]

[When a creditor has a demand on his debtor, which is capable of being ascertained without the intervention of a jury, and the debtor becomes a bankrupt, it may be proved as a debt under the commission. *Utterston v. Vernon, B. R. H. 30 Geo. 3. 3 T. R. 539.*]

[There-

[Therefore if *A.* lend *B.* so much stock, to be replated as stock, without naming any particular day, and *B.* become a bankrupt, *A.* may come in under the commission for the price of the stock on the day of the bankruptcy. *Utterson v. Vernon*, *B. R. H.* 30 *Geo.* 3. 3 *T. R.* 539.—*B. R. H.* 32 *Geo.* 3. 3 *T. R.* 570. *contra.*]

(D 4.) The Power of the Commissioners.

(D 4.) *For discovery of the bankrupt.*] By the *st.* 13 *El.* 7. the commissioners, or major part, have full power to take order by their discretion in the body of the bankrupt, wherever found, in his house or elsewhere, by his or her imprisonment, &c.

And by the *st.* 13 *El.* 7. and 1 *Jac.* 15. if the bankrupt withdraw, and on warning three several times left at the house of his most usual abode for the year last past, do not appear before the commissioners, the major part of them may make him to be proclaimed in the queen's name five market-days, near the place of his abode, to appear at a time appointed, and if he does not then appear, he shall be out of the queen's protection, and the commissioners may send a warrant to apprehend him.

And by the *st.* 13 *El.* 7. if any person conceal him so proclaimed, he shall suffer such fine and imprisonment, as the lord chancellor shall think meet.

And by the *st.* 21 *Jac.* 19. the major part of the commissioners, or any by their warrant, may break open the house of the bankrupt, and seize his body, &c.

By the *st.* 4 & 5 *Ann.* 17. on certificate under the hands and seals of the major part of the commissioners, that such commission is issued, and the party is found a bankrupt, any judge, or justice of peace, may grant a warrant to apprehend him, and commit him to the county-gaol, of which the gaoler shall forthwith give notice to the commissioners, that they by warrant may remove him before them, &c. revived by the *st.* 5 *Geo.* 24. [5 *G.* 2. 30.]

And if the bankrupt, in 30 days after notice of the commission left at his usual abode, and published in the Gazette, (which time the lord chancellor, &c. five days before the time of such surrender, may enlarge not exceeding 60 days,) do not surrender himself to some of the commissioners, and submit to be examined, he shall suffer as a felon. Enlarged by the *st.* 5 *Geo.* 24. and 5 *Geo.* 2. 30.

[By the latter statute, the time for surrender is 42 days after notice in writing, left at the usual place of abode, or personal notice in case the bankrupt be in prison, and notice in the Gazette. And the lord chancellor, &c. may enlarge the time, not exceeding 50 days, to be computed from the end of the 42 days, provided the order for enlargement be made six days at least before the expiration of the 42 days.]

[And the commissioners shall appoint within the 42 days, not less than three several meetings, the last of which shall be on the 42d day. *s.* 2.]

By the *st.* 5 *Geo.* 24. any judge, baron, or justice of peace by warrant, &c. may apprehend, &c. *ut supra.* And if the gaoler suffer an escape, he forfeits 500 *l.*

[A man may go before the commissioners, and submit to them

for the time, yet protesting he is no bankrupt, and may notwithstanding bring an action in reasonable time against the assignees. *Flower v. Herbert*, T. 1751, 2 *Vesey*, 326.

(D 5.) *And of the act bankruptcy.*] After the commission issued, the commissioners, or the major part, ought to examine, whether he be a bankrupt; for the *st. 21 Jac. 19.* says, after any person shall by the commissioners, or major part of them, be adjudged and declared a bankrupt.

And by the *st. 4 & 5 Ann. 17.* the commissioners may call before them any person who they believe can give account of any act of bankruptcy, and examine him thereto on oath, or otherwise; and if he, having his charges paid or tendred, refuse to appear, or to be sworn, and answer all questions, &c. they may commit him without bail till he submit, &c. revived by the *st. 5 Geo. 24.*

Provided none be obliged to travel above twenty miles to be examined. Revived by the *st. 5 Geo. 24.*

(D 5.) *By appointing a provisional assignee.*—[The commissioners, or the major part of them, may, as often as they shall see cause, for the better preserving and securing the bankrupt's estate, immediately appoint one or more assignee or assignees of the estate and effects, or any part thereof; and this provisional assignee, &c. shall be removed at the meeting of the creditors, afterwards to be held for the choice of assignees, and shall deliver up and assign all the estate and effects come to his hands, under the penalty of 200*l.*, to be divided among the creditors rateably, in satisfaction of part of their debts, to be recovered by action of debt, &c. with full costs of suit. 5 *G. 2. c. 30. s. 30.*]

(D 6.) *For discovery of his estate. By examination of the bankrupt.*] By the *st. 1 Jac. 15.* the major part of the commissioners may examine a bankrupt on such interrogatories as they shall think meet, touching his lands, goods, debts, books of account, &c. or his secret grants, or cloining of them, &c.

And if he refuse to be examined, or answer fully, they may commit him till he conform.

[Or, if upon his examination he swear to an account which appears to them incredible, they may commit him. *Ex parte Noulan*, B. R. M. 35 *G. 3. 6 T. R. 118.*]

And if he commit perjury, to the damage of his creditors, to the value of 10*l.*, being convicted, he shall be pilloried, and lose one of his ears.

[The bankrupt ought to have a copy of the interrogatories, and time to consider of his answer, and he cannot be committed for not answering questions which are not in writing. *Rex v. Solomon Nathan*, M. 4 *G. 2. Str. 880.*]

[The bankrupt is not obliged to attend assignees to assist in making out his accounts after the forty-two days, or the enlarged time; for his protection from arrests extends no further. *Ex parte Turner*, T. 1742, 1 *Atkyns*, 148.]

[*Hardwicke C.* said, he would compel his attendance, if indemnified from arrests by creditors under the commission, tho' not by creditors at large. *Ibid.*]

If

If after a person is declared a bankrupt, and the three sittings at *Guildhall* advertised, the commissioners have proof that he is secreting his effects, they may summon him to appear sooner, and on his non-attendance certify it to a judge, who may commit him to *Newgate*; they may then bring him before them, and if he refuses to be examined, they may re-commit him. *Ex parte Lingood*, P. 1742, 1 *Atkyns*, 240.]

[That I have lost 2000*l.* on goods sold last year, and 1000*l.* on mournings, and have been extremely extravagant for ten years; is not a sufficient answer to an inquiry after a deficiency of 13,000*l.* *Rex v. Perrot*, H. 1 G. 3. 2 B. M. 1122.]

[Nor, expences attending my connections with the fair-sex, 5000*l.*]

[Nor, that he had given 5000*l.* to a woman now dead, and all letters, &c. burnt. *Rex v. Perrot*, T. 1 G. 3. 2 B. M. 1215.]

[The examination, nor their power of commitment, nor the duration of the commitment, is not confined to the time limited for bankrupt's surrender. *Ibid.*]

By the *st.* 21 *Jac.* 19. if a bankrupt be found to have fraudulently conveyed away goods, or lands, to the value of 20*l.*, and do not discover, and if he can, deliver to the commissioners all the estate and goods so conveyed, and be thereof convicted upon indictment, &c. he shall be pilloried, and lose one ear.

By the *st.* 4 & 5 *An.* 17. if a bankrupt on examination do not fully and truly discover all his effects, books, &c. and how disposed, and deliver up all in his power, &c. he shall suffer as a felon. So, by the *st.* 3 G. 12. a bankrupt against whom a commission issued on or before 26 June 1716, at which time the former act expired. So, by the *st.* 5 G. 24. and 5 G. 2. 30.

[If a bankrupt is indicted by a creditor who has not proved his debt, for not surrendering within the time, and the assignees and other creditors declare they are satisfied with his behaviour, the court will not give their assistance by ordering the clerk to attend with the proceedings; for the law seems to intend such prosecution should be with the concurrence of the creditors under the commission. *Ex parte Wood*, T. 1 51, 1 *Atkyns*, 221.]

[Where a bankrupt has not surrendered in time, but there appears no intention of defrauding, the chancellor may supersede the commission, to prevent prosecution. *Ibid.*]

So, by the *st.* 5 G. 24. if he conceal, destroy, &c. any of his effects to the value of 20*l.*, or any books of account, bonds, &c. of intent to defraud creditors. So, by 5 G. 2. 30.

So, if after his certificate he refuse to attend the commissioners or the court, to make out any debt, &c. having fourteen days notice, and 2*s.* 6*d.* *per diem* allowed him, he shall be committed.

(D 7.) *Of his wife.*] So, by the *st.* 21 *Jac.* 19. the commissioners may examine on oath the wife of any one found a bankrupt, as to the estate, or goods of the bankrupt concealed, or disposed by her, or any other, who refusing to appear, or be examined, or not disclosing the truth, shall forfeit the same penalty, as any other person should in the like case.

But before this statute the wife could not be examined by the commissioners against her husband. 1 *Brownl.* 47.

(D 8.) *Or of others.*] So, by the *st. 13 El. 7.* the commissioners may send for any persons suspected to have any goods, or debts, of the bankrupt, or to be indebted to him, and may examine them on oath or otherwise, about the truth and certainty thereof: and if any refuse to be sworn, or disclose not the whole truth, on proof thereof before the commissioners by witness or otherwise, he shall forfeit double the value of the goods, or debts concealed, to be levied by the commissioners on his or their lands and goods, &c. for the benefit of the creditors, in the same manner as they may order the lands or goods of the bankrupt himself.

And by the *st. 1 Jac. 15.* the commissioners may by warrant, &c. commit the party refusing to appear, or to be sworn, and answer such interrogatories as shall be ministered to him, without bail, till he submit to be examined, &c.—So, by the *st. 5 Geo. 24.* as to acts of bankruptcy.

[If the examination of a person is by order limited to the bankrupt's trading only; that shall not restrain the commissioners from asking any questions relevant to his being a trader, or any circumstances relating thereto; as, whether he had assigned over his share. *Ex parte Parsons, M. 1747, 1 Atkyns, 204.*]

[Counsel ought not to be allowed to every person on their examination. *Ibid.*]

A witness interrogated, *Did you buy by yourself, or by a broker?* I cannot positively recollect. *Can you form any belief?* I should rather believe by a broker. *Do you or do you not believe?* &c. I can give no other answer. *By the words I should rather believe, &c. do you mean you believe you bought by a broker, or that you believe you did not buy by a broker?* No answer. His answer before was sufficient; and on *hab. corp.* discharged. *Miller's Case, P. 13 G. 3. 3 Wils. 420.*]

[The court will not restrain commissioners in their examinations, and instead thereof order a person to be examined on interrogatories. *Ex parte Bland, M. 1747, 1 Atkyns, 205.*]

And such person convicted of wilful perjury, &c. or any convicted of suborning them, shall suffer such punishment concerning perjury as in *5 El. 9.*

Provided the commissioners allow the witnesses sent for, such costs as they think fit. And by the *st. 5 G. 24.* they are not obliged to go above 20 miles.

By the *st. 4 & 5 Ann. 17.* in case the bankrupt do not surrender himself, and conform, &c. all persons who have accepted any trust, or conceal any real or personal estate of the bankrupt, shall, in thirty days after notice of the commission, discover such trust and estate in writing to one of the commissioners, and submit to be examined, &c. or forfeit 100*l.*, and double the value of the estate concealed, to be recovered by the assignees for the benefit of the creditors, with costs, &c. And any person voluntarily discovering, &c. in sixty days after the time allowed to the bankrupt to surrender, shall have 3*l.* per cent. from the assignees, of the net proceed of what shall be recovered by such discovery. Revived by the *st. 5 Geo. 24.* [So, by *st. 5 Geo. 2. c. 30.*]

But a commitment, till he conform to their authority, is void. *R. 1 Sal. 348.*

Or, till discharged by due course of law. *R. 1 Sal. 551.*

(D 9.) *By seizure of his effects.*] By the *st. 13 El. 7.* if any detain goods, lands, or debts of a bankrupt fraudulently, &c. he shall forfeit double the value of them, to be levied in the same manner as the forfeiture for concealing such goods, &c. on examination, &c. and to be employed for the benefit of the creditors; or if they be paid, then a moiety to the queen, and a moiety to the poor, &c.

And by the *st. 21 Jac. 19.* the commissioners, or any by their warrant, may break open the house, chambers, warehouse, shop, doors, or trunks of the bankrupt, and seize his goods, money, or other estate.

So, by the *st. 4 & 5 Ann. 17.* on certificate from the commissioners of the commission, and that the party is found a bankrupt, any judge or justice of peace may grant a warrant to seize any goods, books, writings, or other real or personal estate of the bankrupt. So, by the *st. 5 G. 24.* [and *st. 5 G. 2. c. 30.*]

And by the *st. 5 Ann. 22.* if the bankrupt, or any other by his consent or privity, remove, conceal, destroy, or embezzle any goods or effects, whereof the bankrupt, or any in trust for him, is possessed, to the value of 20*l.*, or any books of account, writings, &c. of intent to defraud his creditors, such bankrupt shall suffer as a felon. So, by the *st. 5 G. 24.* and *5 G. 2. 30.*

(D 10.) *For disposal of his estate. What lands and goods. All his real estate.*] By the *st. 13 El. 7.* the major part of the commissioners have full power by their discretion to take order with all a bankrupt's lands, tenements, and hereditaments, as well copy as freehold, which he shall have in his own right before he became a bankrupt.

And therefore, the commissioners may sell all lands and tenements, which the bankrupt had at the time of his bankruptcy in fee, for life, or for years.

So, all rents, annuities, offices, &c.

So, all copyhold estates; for they are within all the statutes of bankrupts. *R. Cro. Car. 550. Vide Copyhold (N).*

So, a reversion, or remainder, as well as lands, in possession.

So, any future interest: as, a term to commence *in futuro.*

[If a man devises lands to *A.* for life, then to trustees to sell and divide the money among *A.*'s children living at *A.*'s death; one of them becomes bankrupt, and gets his certificate, and *A.* dies, this contingent interest shall go to the assignees. *Higden v. Williamson, M. 1731, 3 P. W. 132.*]

[The assignees may sell the office of under-marshal of the city of London; for it does not relate to the administration of justice, but only of the police of the city. *Ex parte Butler, T. 1749, 1 Atk. 210.*]

[If an officer of the army becomes bankrupt, the chancellor may lay his hands on his pay. *D. per Hardwicke C. Ibid.*]

[If the bankrupt will not surrender his office, and absconds; the court will not order, but recommend it to lord mayor and aldermen to dismiss him for neglect of duty, and to admit the purchaser. *Ex parte Butler, M. 1749, 1 Atkyns, 215.*]

[If tenant in tail mortgages for years, becomes bankrupt, and dies without suffering recovery, the assignee shall have the land, clear of the mortgage. *Beck v. Hawkins, T. 24 G. 2. 1 Wils. 276.*]

(D 11.)

(D 11.) *Tho' a joint purchaser with his wife, &c.*] So, by the *st.* 13 *El.* 7. the commissioners may sell all lands, tenements, and hereditaments, which the bankrupt shall have purchased for money, &c. jointly with his wife, children, or child, for his own use, or for such use or interest as he might lawfully depart withal.

Yet, if a purchase in the name of himself and his wife, and son, was before his trading, the commissioners cannot sell it. *R. per three J. Cro. Car.* 550.

So, by the *st.* 13 *El.* 7. the commissioners may sell lands, &c. purchased with any person to the secret use of the bankrupt.

So, if the bankrupt be a joint-tenant in fee, for life or years, the commissioners may sell a moiety.

If he be seised in right of his wife, they may sell during the coverture.

(D 12.) *Tho' conveyed to his children or trustees.*] So, by the *st.* 1 *Jac.* 15. the commissioners may sell all lands, &c. offices, &c. goods, chattels, and debts, which such person who shall become bankrupt shall have conveyed, or cause to be conveyed to any of his children, or other person, or into any other men's names, as amply as if such bankrupt, at the time of the bankruptcy, had been actually seised, or possessed in his own name, of the like interest.

[So, where a trader advanced half the money for the renewal of a lease, the lessee giving a note for the repayment of the money, unless she should by will give the estate to one of his children; she bequeathed the estate to his daughter, and the father becoming bankrupt, a moiety of the estate vested in the assignees under this statute. *1 Brown. Ch. Rep.* 160.]

So, if they are conveyed before his bankruptcy, in consideration of marriage, to the use of himself and his wife; tho' the wife is not named by the *stat.*; for she is within the intent. *R. Sti.* 289.

[If *A.*, in declining circumstances, conveys an estate for an inadequate consideration, it shall only stand for a security for as much as was really due, and the estate be conveyed to the assignees. *Barwell v. Ward, H.* 1744, *1 Atkyns*, 260.]

[If a legacy has been left to the wife of a man who becomes bankrupt before he receives it, and the wife dies, the assignee shall not be obliged to make any provision for the issue of the marriage, especially if they are otherwise provided for. *Hearle v. Greenbank, P.* 1749, *3 Atkyns*, 695. *1 Vesey*, 298.]

[Lands conveyed by *A.* after marriage to trustees, in consideration of five shillings, and other valuable considerations, in trust for himself for life, to his wife for life, then to his eldest son if he survives father and mother, then to his other sons; if *A.* becomes bankrupt 22 years afterwards, shall be conveyed by the trustees to the assignees, by virtue of *stat.* 1 *Jac.* 1. c. 15. *Walker v. Burrows, M.* 1745, *1 Atkyns*, 93.]

[But if a man, not a trader or in debt, makes a voluntary settlement on a child, and afterwards becomes a trader and a bankrupt, this settlement is not liable to the bankruptcy. *Lilly v. Osborn, T.* 1734, *3 P. W.* 298.]

(D 13.) *Tho' seised only in tail.*] So, by the *st.* 21 *Jac.* 19. the commissioners

missioners may sell, &c. all lands, &c. whereof the bankrupt is seised in tail, in possession, reversion, or remainder, whereof no reversion or remainder is in the gift of the king, &c. which shall be good against issues in tail, and all others, whom the bankrupt might bar of any remainder, title, possibility, &c. by a common recovery.

So, they may sell an estate which the bankrupt has, to commence upon a contingency.

(D 14.) *Tho' he has only an equity of redemption.*] So, by the *st.* 21 *Jac.* 19. if the bankrupt has conveyed lands, &c. goods, &c. on condition, or under power of redemption, the commissioners may before the time of performance of the condition, under their hands and seals, appoint a person to make tender of payment, or performance according to the nature of the condition. And after such tender, &c. the commissioners may sell such lands, goods, &c. for the benefit of the creditors, as any other of the bankrupt's estate.

(D 15.) *Tho' it descends after his bankruptcy.*] So, by the *st.* 13 *El.* 7. the commissioners may sell all lands free, or copy, fees, goods, &c. purchased, or which shall descend, or by any means come to the bankrupt, after his being declared a bankrupt, at any time before the debts to the creditors be fully satisfied, or agreed for.

[A legacy to a bankrupt, when the testator dies after the certificate is signed by the creditors and commissioners, but before it is allowed, shall go to the assignees for the benefit of the creditors. *Tudway v. Bourn*, H. 32 G. 2. 2 B. M. 716.]

(D 16.) *All goods and debts.*] So, by the *st.* 13 *El.* 7. the commissioners may sell all money, goods, chattels, merchandises, wares, and debts of the bankrupt wherever found.

And by the *st.* 1 *Jac.* 15. the commissioners may grant, and assign any debts due to the bankrupt, or to be due, from what person or in what manner soever, to the benefit of the creditors; which assignment shall vest the property of such debt in the assignee, as fully as if the bond, &c. were made to such assignee, so that the bankrupt shall not afterwards recover, release, or discharge the same, nor shall it be attached as a debt of the bankrupt.

And therefore, the commissioners may sell all the goods of the bankrupt, tho' he sold them *bonâ fide* after his bankruptcy, and before the commission awarded. *Vide ante*, (C 9.)

Tho' he sold them in *market overt*. *Per Twisd.* 1 *Lev.* 174. 1 *Sid.* 272.

A fortiori, goods sold by the bankrupt after the commission, before seizure. *R. Mo.* 594.

Tho' the bankrupt pay his money to any creditor for a just debt. *R.* 2 *Co.* 25. *b.*

A ship-builder who repairs a ship, and delivers possession of it, has no specific lien upon it, but must come in under the commission for his debt, and must deliver up the money for which he sold the ship. *Ex parte Shank*, T. 1754, 1 *Atk.* 234.]

[A captain of a ship has no lien upon her for wages, stores, or repairs done in *England*. *Wilkins v. Carmichael*, B. R. H. 19 *Geo.* 3. *Dougl.* 101.]

[A miller

[A miller to whom a meal-man is indebted for grinding corn, has no specific lien on corn in his hands at the bankruptcy for the money formerly due, but only for grinding the corn then in his hands. *Semb. Ex parte Ockenden, T. 1754, 1 Atkyns, 235.*]

[A mortgage or conditional disposition or conveyance of goods is within 21 *Jac. 1. c. 19. ff. 10, 11.* but extends to goods only originally the bankrupt's; and choses in action are within the clause. *Ryall v. Rolle, H. 1749, 1 Atkyns, 165. 1 Vesey, 348. 1 Wilf. 260.*]

[A share of partnership trade and utensils, &c. mortgaged to a partner, must be delivered, or it is a delusive credit, and falls within that statute. *Ibid.*]

[If one partner lends money to another generally, and it is not entered on the partnership books, he gains no specific lien on the share of the borrower, nor shall be preferred to separate creditors on a bankruptcy. *Ibid.*]

[If a man advances money on a conditional sale of goods, and does not insist on the delivery of them, he confides in the credit of the vender, and has no real or particular security, but must come in as any other creditor under a commission of bankrupt against him. *Ibid.*]

[If a partner pay a debt due to the crown, and take an assignment, the partnership effects must be applied to pay the partnership debts, before he can claim any thing out of it, either as his share or debt. *West v. Skip, P. 1750, 1 Vesey, 456.*]

[A. and B., partners, are indebted to C., without whose knowledge on 26th A. lodges goods at a public warehouse for C.; on 27th he absconds, on 28th he sends bills of parcels to C., (who had not purchased or agreed for them,) on 30th C. receives the bill of parcels, sells the goods, and applies the money in part payment of the debt. The assignees recover the whole goods on *trover*. *Hague v. Rolliston, H. 8 G. 3. 4 B. M. 2174.*]

[A. and B., partners, indebted to C., in contemplation of their bankruptcy, indorse a note of D., to whom they have given notes for the same sum to C., and send it by the post; they are bankrupts before he receives it; there was no such course of dealing between them; there appears no appropriation of the note. Assignees recover. *Alderson v. Temple, T. 8 G. 3. 4 B. M. 2235.*]

[If bills are sent, or goods consigned, tho' without his knowledge, to one who has paid value before, assignees shall not recover. Otherwise, if consideration not paid, Chancery interposes. *Ibid.*]

[All acts to defraud creditors are void. *Ibid. 3 Wilf. 47. Cowp. 117. 627. Dougl. 96.*]

[An insolvent debtor cannot go out of the common course of trade to prefer a creditor, but he may prefer one in the common course of trade. *Ibid.*]

[Assent is necessary to complete a contract; yet bills, &c. sent to a great distance may be good, tho' bankruptcy intervenes before arrival. *Ibid. Cowp. 117.*]

[A., a linen-draper, buys goods on credit; B. his brother, a banker, employs C. to buy them of A. at prime cost, to whom he gives his notes, which are paid unto B.; C. sells the goods, and accounts for them to B.; B. sends another man, D., to buy them at prime cost, and gives him bank notes to pay for them; A. changes the notes for others

others which he pays unto *B.*; *D.* sells the goods, and accounts for them to *B.* It is a fraud, (tho' not an act of bankruptcy, because no deed nor conveyance,) the sale void; and trover lies for the assignees against *B.* *Martin v. Peutrefs, M. 10 G. 3. 4 B. M. 2477.*]

[On a loan of money, a trader in insolvent circumstances assigns a third of his effects to the lender, and two days after becomes bankrupt; it is fraudulent and void. *Linton v. Bartlet, H. 10 Geo. 3. 3 Wilf. 47.*]

[Where a sale of goods has been completed by actual delivery to the buyer, who afterwards becomes insolvent before they are paid for; he cannot rescind the contract, and return the goods with the consent of the seller, so as to give him a preference to his other creditors. *Barnes v. Freeland, B. R. M. 35 Geo. 3. 6 T. R. 80.*]

[And if he does, trover will lie by the assignees for them. *Ibid.*]

[If a bankrupt give a preference to a creditor under the apprehension of legal process, however groundless, such preference is binding. *Thompson v. Freeman, B. R. E. 26 Geo. 3. 1 T. R. 155.*]

[A creditor, knowing his debtor to be in distressed circumstances, and not able to pay his debt, applied to him in the first instance about two months before his bankruptcy for a security, and took part of his stock in trade for that purpose; this is not an undue preference, tho' the creditor did not threaten to sue him in case of a refusal; and the assignees cannot recover the property so delivered. *Smith v. Payne, B. R. H. 35 Geo. 3. 6 T. R. 152.*]

So, they may sell his goods in Ireland.

They may sell monies due to the bankrupt upon a judgment. *Jon. 215.*

And judgment may be entred upon a *scire facias*, after verdict against the terre-tenant, at the request of the assignee, without a new *scire facias* by him. *5 Mod. 88.*

So, an heriot, relief, &c. due to the bankrupt.

So, a debt upon a bond to *A.* as trustee for the bankrupt. *R. Pal. 505.*

So, they shall have an equity of redemption, which the bankrupt had. *2 Ver. 97.*

So, a legacy given to the bankrupt, for which he had a decree. *R. 2 Ver. 433.*

So, they may sell goods of the bankrupt forfeited, and seized by a *capias utlagatum* after the bankruptcy, and before the commission; for a bankrupt shall not defeat his creditors, by his act or default. *R. 1 Sal. 109. R. cont. in the Exchequer, Hil. 6 Geo.*

So, by the *stat. 5 Geo. 2. 30.* the goods of a bankrupt, being a felon, shall go among the creditors.

(D 17.) *Tho' he has only the disposition by consent of the owner, &c.]* And by the *stat. 21 Jac. 19.* the commissioners may sell all goods, whereof the bankrupt shall be reputed owner, and with the consent of the true owner, take upon him the sale and disposition, tho' formerly conveyed by the bankrupt to such true owner for valuable consideration. *Vide Coup. 232.*

[Where *A.*, a trader, and an officer in the *East India Company's* service, assigned his privilege, consisting of shipping goods from the *East Indies* to *England* to *B.*, for a valuable consideration; and in order

order to evade the bye-laws of the *East India Company*, which prohibits such assignments, the goods were shipped, entred, warehoused, and sold by the Company in *A.*'s name, and the proceeds carried to his account; but before *A.* received those proceeds from the Company, he became a bankrupt: it was holden, that his assignees were entitled to recover the amount in an action for money had and received against the *East India Company*, who retained the same; this being such a possession of "goods and chattels" in the bankrupt as falls within this statute. *Gordon v. East India Company*, B. R. E. 37 Geo. 3. 7 T. R. 228.]

[To bring a case within this statute the bankrupt must have been a trader when he was in possession of the property. *Ibid.*]

[If the furniture of a coffee-house be taken in execution by a creditor, and, without ever being removed, be let by him to the keeper of the coffee-house, who becomes bankrupt while in possession of it, the commissioners are entitled to it. *Lingham v. Biggs*, C. P. T. 37 G. 3. 1 Bsf. & Pull. Rep. 82. *Bryson v. Wylie*, B. R. H. 24 Geo. 3. *Ibid.* p. 83. n. (a).]

[Goods, the property of a widow and children, were upon her second marriage assigned to trustees, in trust to suffer the husband to enjoy them, on condition that he should pay to the trustees for the use of the children 800*l.* by yearly instalments of 100*l.* from July 1789; he continued in possession of them till 1797, having paid only 250*l.*; the day before his bankruptcy the trustees re-possessed themselves of the goods; and it was holden, that this was fraudulent as against creditors; and that the assignee of the bankrupt was entitled to the goods under this statute. *Darby v. Smith*, B. R. M. 39 G. 3. 8 T. R. 82.]

And all lands, goods, &c. extended after his becoming a bankrupt, on pretence of his being accomptant, or indebted to the king, if upon examination by the commissioners on oath it be found such debt be due to such accomptant or debtor on a contract not originally made between him and the bankrupt, but made with, or in trust for, some other person.

So, goods taken in execution after an act of bankruptcy, tho' the writ bears *teste* before. *Semb.* 1 Lev. 173.

So, a judgment obtained by a creditor after an act of bankruptcy shall be avoided.

So, by the *stat.* 21 Jac. 19. if the bankrupt had granted or pledged his goods, &c. for payment of the money, the commissioners may pay or tender the money, and then sell the goods.

Yet if the goods of a bankrupt are seized in execution after the bankruptcy, and sold by the sheriff, the commissioners cannot assign the money raised by the sale, but they must assign the goods themselves. R. 3 Lev. 192.

[So, if a bankrupt, after he has obtained his *certificate*, trading again for himself, be left for several years in possession of his house, household goods and furniture, in order to assist in settling the affairs of the bankrupt estate, the assignees repeatedly stating the goods, &c. in their accounts with the creditors, as part of the estate, such possession does not fall within 21 Jac. 1. c. 19. s. 4. so as to vest the goods in assignees under a new commission. *Doug.* 317.]

So, if goods are taken in execution by the sheriff at the suit of the bankrupt,

bankrupt, they cannot be assigned till they come to the hands of the bankrupt. *R. Jon.* 215. *Cro. Car.* 166. 176.

Nor, damages, which the bankrupt may recover for trespass or slander, before they are ascertained by judgment. *Jon.* 215.

[Where a bankrupt is in possession of the goods of another *bonâ fide*, with the consent of the owner at the time of the bankruptcy, for a specific purpose, beyond which he has not the right of disposition or alteration, that is not such a possession as entitles the assignees to recover the value of them under this statute. *Collins v. Forbes*, *B. R. T.* 29 *Geo.* 3. 3 *T. R.* 316.]

(D 18.) *What not, lands, &c. sold bonâ fide before the bankruptcy*] But by the *stat.* 13 *El.* 7. the commissioners cannot sell lands, &c. assured by the bankrupt before he became bankrupt, so as such assurance be made *bonâ fide*, and the party to whose use made, be not privy or consenting to the purpose of the bankrupt, to deceive his creditors, at or before such assurance.

Nor, lands, which the bankrupt had sold by deed indented, tho' the inrolment was after the bankruptcy. *Jon.* 203.

So, by the *stat.* 21 *Jac.* 19. no purchaser for a valuable consideration shall be impeached, unless the commission to prove him a bankrupt be sued in five years after he shall become a bankrupt.

So, if the bankrupt be afterwards outlawed, and *A.* gives money for a lease of his land from the king, before the commission sued, he will be a purchaser *bonâ fide* for so much. *R.* 1 *Sal.* 109.

[If *A.* after marriage, in consideration of a sum paid by his wife's brother, settles an estate to himself for life, remainder to trustees to preserve, &c. to the wife for jointure, to trustees for 99 years, on the trusts after expressed, and then to the sons in tail male; and no declaration of the uses of the term for 99 years. *A.* becomes bankrupt: this use shall not revert to *A.* and his assignees, but shall be considered as a trust term to attend the inheritance; and the assignees take only the interest *A.* has in the estate, that is, for his life. *Brown v. Jones*, *M.* 1744, 1 *Atkyns*, 188.]

(D 19.) *Or which he had as trustee.*] Nor, lands, which the bankrupt has as a trustee only, for payment of the debts of another. *R. in Chanc. Trin.* 2 *Geo.* inter *Clopham & Gallant*.

[If a bond is given to a trustee, to secure the payment of an annuity to a woman who marries and brings a fortune to *A.*, who becomes a bankrupt, and the woman has nothing to subsist on but this annuity, the assignees shall deliver the bond to her, and she shall receive the arrears and future payments. *Ex parte Coysegane*, *M.* 1753, 1 *Atkyns*, 192.]

[Specific effects (even money if distinguishable) of a testator in the hands of his executor a bankrupt, shall not be seized. *Howard v. Jemmet*, *H.* 3 *G.* 3. 3 *B. M.* 1368.]

[Nor, money belonging to the parish in the hands of an overseer of the poor become bankrupt. 1 *Term Rep.* 370.]

[Nor, does a debt, due to the bankrupt as trustee for another, pass under the assignment. 1 *Term Rep.* 619.]

[And he may sue the debtor in his own name for the benefit of the person for whom he is trustee. *Id. ibid.*]

(D 20.)

(D 20.) Or upon which an execution was executed.] Nor, by the *stat. 21 Jac. 19.* lands or goods, &c. whereof an extent or execution is served and executed before he became bankrupt.

So, if a statute be extended upon the lands, tho' the *liberate* was not sued before his bankruptcy. *R. Cro. Car. 149. Jon. 203.*

Nor, goods taken in execution for the bankrupt, before the return of the writ. *R. Cro. Car. 166. 176. Jon. 215.*

So, if an execution be made after an act of bankruptcy, and before notice of it, upon a writ telle'd before the bankruptcy, *trover* does not lie by the assignees against the officer. *R. 1 Lev. 173. 1 Sid. 271.*

Yet goods, not taken in execution, may be sold, tho' the writ of execution was delivered to the sheriff before his bankruptcy. *R. 3 Lev. 70. 192.*

[And if money is levied by sheriff on *fi. fa.* which he returns, and pays plaintiff the money, before defendant has lain two months in prison, which he afterwards does, and thereby becomes bankrupt, by relation prior to the execution; plaintiff shall refund the money. *Coppendale v. Bridgen, T. 32 & 33 G. 2. B. M. 814. Vide Cooper v. Chitty, post. (D 29.)*]

[A landlord may distrain for his rent on a bankrupt's goods, either before or after the assignment; but if he neglects it, and suffers them to be sold by the assignees, he comes in on an average with the rest of the creditors. *Anon. P. 1740, 1 Atkyns, 102. Ex parte Descharmes, H. 1742, 1 Atkyns, 103. Ex parte Jacques, M. 1730, Ex parte Dillon, H. 1733, 1 Atkyns, 104.*]

[The landlord may distrain for his entire rent due, on any goods remaining on the premises, even tho' sold by the assignees, if not removed. *Ex parte Plummer, H. 1739, 1 Atkyns, 103. Ex parte Grove, P. 1747, 1 Atkyns, 104.*]

[A landlord, tho' he made no distress, has been considered as within the equity of the statute, giving him a year's rent on executions. *Ex parte Plummer, H. 1739, 1 Atkyns, 103.*]

[If a landlord comes in and proves his debt for rent under the commission, and the assignees sell the goods to a person who lives on the premises, and the goods remain there, and the landlord afterwards distrains, his proceedings on the replevin shall be restrained, and he confined to his remedy under the commission. *Ex parte Grove, P. 1747, 1 Atkyns, 104.*]

[If a candle-maker, being in arrear for the single duties, become a bankrupt, and is convicted after the assignment of his effects, the double duties are a lien upon the candles, utensils, and materials in the hands of the assignees; and they may be distrained. *Stracy v. Hulfe, B. R. T. 20 G. 3. Dougl. 411.*]

[If a soap-maker, having incurred a forfeiture for having concealed soap contrary to the *stat. 1 Geo. 1. sess. 2. c. 36.* become bankrupt, and a provisional assignment of his estate be made, after which the soap is condemned and the bankrupt convicted, and thereupon a warrant issues to levy the penalty on his goods generally; such a warrant is bad, and cannot justify a seizure of the soap in the hands of the assignees. *Austin v. Whitehead, B. R. M. 36 Geo. 3. 6 T. R. 436.*]

[*Quare*, Would the seizure have been legal if the warrant had pursued the words of the statute? *Ibid.*]

(D 21.) *Or which were settled upon the marriage of a son, &c.*] So, by the *stat. 1 Jac. 15.* the commissioners cannot sell land, &c. or goods, &c. purchased, or conveyed by the bankrupt upon the marriage of any of his children, both parties being of years of consent.

So, if a lessee for years has a covenant for renewal, the assignee shall have no benefit of it. *2 Ver. 97.*

So, if land be settled in trust for the wife of *B.* by the ancestor of such wife, and *B.* becomes a bankrupt, the assignee shall have no benefit of such trust, during the joint lives of *B.* and his wife. *R. 2 Ver. 96.*

So, if the father of *B.* covenant upon his marriage to pay *15 l. per ann.* to *B.* during the life of the father, and *B.* becomes a bankrupt, the assignees shall not have the benefit of such agreement. *R. 2 Ver. 194.*

[The fortune of a wife may be settled on the husband till he fails, and then to her separate use, and the creditors shall not have the profits of it. *Lockyer v. Savage, H. 6 Geo. 2. in Scac. Str. 947.*]

[If wife, possessed of plate, has power to dispose of it by articles before marriage, and appoints it to her children by a former husband, this plate is not within *stat. 21 Jac. 1.*, but shall be delivered to the children. *Ex parte Marsh, T. 1744, 1 Atkyns, 158.*]

[If wife has a contingent interest in a bond given by husband on marriage, but no judgment or trustees, and has also a lease left her by her father, which the executor will not give up without further provision for her; and she agrees that on part of the money arising by sale of lease, being settled to her separate use during life, and then to her children, she will give up her interest in the bond, this settlement is good against creditors. *Ward v. Skellet, T. 1750, 2 Vesey, 16.*]

(D 22.) *Debts and goods, &c.*] So, by the *stat. 1 Jac. 15.* the commissioners cannot assign debts paid by a debtor to the bankrupt, truly and *bonâ fide*, before he understood him to have been a bankrupt. *R. 3 Keb. 190.*

Nor, goods bought of a bankrupt *bonâ fide*, for a valuable consideration, before notice of the bankruptcy. *Semb. Skin. 149.*

Nor, goods delivered by a bankrupt, pursuant to an award confirmed in *Chancery* without fraud, before notice that he was a bankrupt. *Qu. 2 Ver. 230.*

Nor, a bond, &c. assigned by the bankrupt for a just debt, before his bankruptcy. *2 Ver. 428.*

So, they cannot assign money, given by the bankrupt after an act of bankruptcy committed, to put his son apprentice, being the usual rate, and given several years before he appeared to be a bankrupt. *R. 3 Lev. 58, 9. Dub. Skin. 21.*

Nor, money recovered against a bankrupt before notice. *3 Keb. 231, 2.*

[A factor gave his acceptance to his principal for the amount of goods sold on account after a secret act of bankruptcy of the principal, but without notice to the factor; and after notice of the bankruptcy the factor paid his acceptance to the holder of the bill; and it was holden that the payment was protected by this statute. *Wilkins v. Casey, B. R. T. 28 Geo. 3. 7 T. R. 711.*]

Nor, goods consigned to the bankrupt but not paid for, which the owner before delivery, hearing that he was a bankrupt, and changing his former consignment, consigns to another. *Cont. at Law, but R. in Equity.* 2 Ver. 203.

[A. by will gave an annuity to B., directing that B.'s receipt alone should be a discharge for it, that B. should not alienate it, and that if he did, it should cease and determine. B. became a bankrupt, and the commissioners assigned the annuity with his other effects to the assignees; and it was holden that the annuity ceased. *Domett v. Bedford, B. R. E. 36 Geo. 3. 6 T. R. 684.*]

So, by the *stat. 5 Geo. 24.* if mutual credit, or debts appear, the commissioners (or by the *stat. 5 Geo. 2. 30.* the assignees) may state the account; and the balance, and no more, shall be claimed, or paid on either side. *Vide post.* (D 27.)

[But a demand against a bankrupt cannot be set off in an action by his assignees for *trower and conversion*, subsequent to the bankruptcy, of effects belonging to the bankrupt's estate. *Doug. 101.*]

[If goods are sold and sent to A. who does not enter them in his books, but before he becomes a bankrupt, delivers them to B. for the use of C. (from whom he had them) that they may not go to his other creditors; the delivery vests the absolute property in C. before his agreement, and the assignee cannot recover them. *Atkins v. Barwick, P. 5 G. Str. 165. Fort. 352.*]

If a merchant abroad sends goods to a factor in London, who becomes bankrupt, the goods are not affected by it. *Godfrey v. Furzo, T. 1733, 3 P. W. 185.*]

[If a bankrupt is an executor, the court will appoint a receiver of the testator's effects unreceived, and order the assignees to deliver over to him such part of his effects as have been received by them, or are in their hands in specie, and they shall be paid in a course of administration. *Ex parte Ellis, H. 1742, 1 Atkyns, 101.*]

[If A. has a note given him by his debtor, and gives it to B. his creditor, who gives him a receipt for it, and A. becomes bankrupt before B. has received the money, and the assignees receive it, they shall be considered as trustees for B., and pay him the money. *Ex parte Byas, M. 1743, 1 Atkyns, 124.*]

[By *stat. 19 Geo. 2. c. 32.* no *bona fide* creditor for goods sold, or bills drawn, negotiated or accepted by bankrupt, shall be liable to refund to assignees any money received of such bankrupt before he knew of his bankruptcy or insolvent circumstances.]

[Under this statute assignees may recover, in an action of *assumpsit*, money paid by a trader, after a secret act of bankruptcy, to a carrier for the carriage of goods; this statute being strictly confined by the courts to *goods sold and bills drawn*, &c. *Bradley v. Clark, B. R. E. 33 Geo. 3. 5 T. R. 197.*]

[A. having recovered a verdict for a certain sum of money against B., B. commits an act of bankruptcy. A., having had no notice of the bankruptcy, afterwards gives time to B., and instead of entering up judgment and suing out execution, takes a bill drawn by B. on C. at a distant period, for the amount of the sum recovered. This is not a payment protected by this statute, and B.'s assignees may recover from A. the money received by him upon the bill. *Pinkerton v. Marshall, C. P. T. 34 Geo. 3. 2 H. Bl. 334.*]

[A trader

[A trader after a secret act of bankruptcy consigned goods to a factor, who agreed to advance money thereon, and accordingly accepted and paid bills drawn on him by the trader; a commission afterwards issued against the trader on such prior act of bankruptcy, after which the factor sold the goods and received the money, and it was holden that he was answerable to the assignees for the amount. *Copland v. Stain*, B. R. E. 39 Géb. 3. 8 T. R. 199.]

[But if the payee of a bill of exchange received from a third person as the price of an estate, give time to the drawer on condition that he shall allow interest, and afterwards the drawer discharge the bill, having in the mean time committed an act of bankruptcy; this is not such a payment in the ordinary course of trade as is protected by this statute; and the assignees may recover the money from the payee. 2 Term Rep. 648.]

[A and B. enter into partnership; afterwards they dissolve it, and B. gives A. a release; A. dies, B. becomes bankrupt: the effects of A. cannot be seized under the commission. *Ex parte Titner*, M. 1746, 1 Atkyns, 136.]

[Assignment of a ship and goods at sea may be good against assignees, though no possession taken; tho' not of goods at land. *Semb. sed qu. Bourne v. Dodson*, M. 1740, 1 Atkyns, 154.]

[Where the bankrupt before his bankruptcy assigned a vessel, in consideration of a debt then due, together with a policy of insurance, covenanting to keep up the insurance; and in pursuance of his covenant made a policy, the vessel being then at sea; but the broker being a creditor of the bankrupt would not part with it, and the bankrupt consented that it should remain with him as a security for his debt: the party to whom the assignment was made is not bound to give up the vessel and come in under the commission, for by the assignment he completely acquired the property, and had a right to a specific performance; tho' it would have been otherwise if by his consent the policy had remained with the bankrupt. 1 Brown. Ch. Rep. 126.]

[An assignment of goods at sea as a collateral security for a debt, and a subsequent indorsement of a bill of lading, are good as against the assignees of the assignor, who committed an act of bankruptcy between the assignment of the goods and the indorsement of the bill of lading. 2 Term Rep. 485.]

[So, where a ship was mortgaged at sea, with a proviso that the mortgagor should continue in possession till failure of payment of the mortgage money on demand, the grand bill of sale was delivered, and the mortgagor became bankrupt before the arrival of the ship, and the mortgagee took possession on her arrival; he may maintain trover against the assignees who took the ship from him, tho' he made no demand either on the bankrupt or his assignees. 2 Term Rep. 462.]

[If A. gives bond to B., and also by deed assigns to him the goods of a ship at sea, and the bills of lading and policies of insurance, to secure re-payment of money, and A. afterwards becomes bankrupt; every thing which could shew a right to the cargo being delivered to B. A. cannot be said to have the order and disposition of it; and it is therefore not within the meaning of 21 Jac. 1. c. 19.; and B. may retain

retain till satisfied principal and interest. *Brown v. Heathcote*, T. 1746, 1 *Atkyns*, 160.]

[Assignment of an outward-bound cargo is a complete contract without delivery, though not of an homeward-bound. *Ibid.*]

[Indorsing bills of lading, without the goods are directed to be delivered to the assignee, is not a sufficient legal sale. *Ibid.*]

[But it is a good equitable lien, as an assignment of *choses* in action is good, and assignees take, subject to all equitable liens. *Ibid.*]

[The clauses in 21 *Jac. c. 19.* do not extend to mortgages or pledges for money or goods, for in assignments or goods beyond sea, it is impossible to deliver them over to the assignee. *Ibid.*]

[*A.* sells to *B.* two-thirds of 500 barrels, and agrees the other one-third should be consigned to *B.* for sale on his (*A.*'s) account: he puts the tar in a warehouse of his own, to wait for shipping, according to agreement. *B.* pays the purchase-money: *A.* becomes bankrupt, and the assignees take possession of the tar in his warehouse, they must re-deliver it to *B.*, for it is not within 21 *Jac. 1. c. 19.* *Ex parte Flynn*, M. 1748, 1 *Atkyns*, 185.]

[The bare exchange of notes with a bankrupt, or giving money for bank-notes, cannot affect a banker, as a trader with that bankrupt. *Ex parte Bland*, M. 1747, 1 *Atkyns*, 205.]

[If *A.* of *Paris* draws on *B.* and promises to make remittances to pay them, and directs all to be entred in distinct account. *G. A.* accordingly remits bills, for which *B.* gives credit in account; *G. B.* becomes bankrupt; *A.* shall have the specific bills delivered up to him. *Ex parte Dumas*, T. 1754, 1 *Atkyns*, 232, 2 *Vesey*, 582.]

[If agents abroad are in disburse for their principal, and doubting his circumstances, make bills of lading to their own order, indorsed in blank; tho' these bills come to the principal's hands, yet if the agent's partner here writes them word that the principal is bankrupt, and desires them to send the bills of lading, and an order to the captain to deliver the goods to him, he may retain them for self and company, till reimbursed what the partnership is in advance. *Snee v. Prescott*, H. 1743, 1 *Atkyns*, 245.]

[If *A.* by will leaves a moiety of what he is entitled unto from another's estate, to *B.* for life, then to *C.* for life, and afterwards to be divided among *C.*'s children living at her death, and this is directed by a decree to be laid out in stock, and the interest to be paid accordingly; and the husband of *C.* assigns this legacy to *D.*, for securing 150*l.* on a contingency mentioned in the deed, which also recites the decree: *C.*'s husband becomes bankrupt; *D.* waives the assignment, comes in as creditor, and assigns the legacy to the assignees:—The stock shall be transferred to *C.*'s daughter, *C.* being dead. *Grey v. Kentish*, T. 1749, 1 *Atkyns*, 280.]

[If a creditor receives money or bills of exchange after act of bankruptcy committed, it is good payment, if no notice, and if the bills are received before the commission issued. *Hawkins v. Penfold*, T. 1754, 2 *Vesey*, 550.]

[A factor has specific lien on goods purchased by him. *Ex parte Emery*, T. 1755, 2 *Vesey*, 674.]

[If after a private act of bankruptcy a factor pays money for his principal, who consigns goods to him, which he sells; the assignee cannot

cannot recover against the factor, tho' it appears that he suspected the principal to be in very bad circumstances. *Foxcroft v. Devonshire*, H. 33 G. 2. 2 B. M. 931.]

[Lending money to traders, knowing them to be in dubious, tottering, or distressed circumstances, on mortgages or liens, is not fraudulent, nor the contract in case of bankruptcy void. *Ibid.*]

[The assignees of a husband cannot take the separate effects of his wife, a sole trader in *London*, in prejudice to her separate creditors. *Lavie v. Phillips*, M. 6 G. 3. 3 B. M. 1776.]

(D 23.) *In what manner the sale shall be.*] By *st. 13 El. 7.* the commissioners, or major part, shall cause the bankrupt's lands, goods, &c. to be searched, viewed, and appraised to the best value; and by deed indented, and inrolled in one of her majesty's courts of record, make sale of all lands, &c. and all deeds and evidences touching only the same, and of all offices, goods, chattels, &c. or otherwise to order the same for satisfaction and payment of creditors.

By the *st. 1 Jac. 15.* the commissioners shall grant, and assign or otherwise dispose all debts due to the bankrupt.

And by the *st. 21 Jac. 19.* by deed indented, and inrolled in six months after making thereof, in some of his majesty's courts of record, they may grant, bargain, sell, and convey any entailed lands, &c.

All lands disposed by the commissioners, may be sold by deed indented and inrolled.

Tho' the lands are entailed; and those in remainder or reversion, as well as the issue in tail, shall be barred without a common recovery.

So, there may be a sale of goods by deed not inrolled. *R. 2 Co. 26. a. 1 Vent. 360.*

And tho' there be no view of the lands by the commissioners before the sale, it will be good.

So, if there be no view of the goods. *R. 2 Cro. 26. a.*

Yet, an assignment is good, tho' the debt assigned is more than was due. *R. Ray. 7.*

But an assignment of land will be void, unless it be by indenture enrolled. *R. 1 Vent. 360.*

So, before inrolment, a demise by the assignee is void to maintain an ejectment, tho' the deed be afterwards inrolled. *R. 1 Vent. 360.*

But by the *st. 13 El. 7.* the vendee of copyhold lands before entry, or taking the profits, shall agree with the lord of the manor for his fine, and on such agreement the lord at the next court holden for the said manor, on request, shall grant the said customary lands, &c. by copy of court roll for such estate, and interest as is sold to the vendee, reserving the antient rents, customs, and services, and shall admit the vendee his tenant of the same copyhold.

Yet, the copyhold is vested in the bargainee before his admittance, though he cannot enter, or take the profits. *R. Cro. Car. 568.*

And he shall avoid all mesne acts between the sale and admittance. *R. Cro. Car. 569. Vide Copyhold (N).*

[If a bankrupt's copyhold estate is assigned to assignees, who enter into agreement in writing to convey it to a purchaser, and make

good title; the assignees must be admitted and surrender, and the lord may take two fines; therefore copyholds should be excepted out of the assignment, and then the commissioners may convey to a purchaser, and save a fine. *Drury v. Mann*, T. 1746, 1 *Atkyns*, 95.]

[The advertisements for sales should not be general, but should name the hour, as masters do: and after the time expired, if the commissioners are not gone, they should admit a better bidder. And if this is not done, the court will open the bidding. *Ex parte Green*, P. 1747, 1 *Atkyns*, 202.]

[(D 24.) Assignee of the Bankrupt.]

(D 24.) *How chosen.*] By the *st.* 5 *Ann.* 22. after the 25th April 1707, the commissioners shall give notice in the *Gazette*, and appoint a time and place for the creditors to meet to chuse an assignee of the bankrupt's estate, and shall assign such estate to no other than such as shall be nominated by the major part of the creditors then present. So, by the *st.* 5 *Geo.* 24.

[But by 5 *G.* 2. c. 30. *st.* 27. no creditor, nor any other for him, shall be permitted to vote in the choice of assignees, whose debts shall not amount to 10*l.* or upwards.]

[Commissioners on the choice of assignees are not critically to examine into the debts, but to admit creditors for what they swear is due to them, as they are liable to an account afterwards, *Ex parte Simpson*, T. 1744, 1 *Atkyns*, 68.]

A creditor is not to be excluded voting, in all cases of open accounts, till the account is taken; yet if the commissioners have doubts, they do right to admit it only as a claim. *Ex parte Simpson*, M. 1744, 1 *Atkyns*, 70.

[The court will not set aside the choice of assignees because many creditors had not an opportunity of voting; and there is no precedent of its being done. *Ex parte Gregnier*, T. 1744, 1 *Atkyns*, 91.]

[Assignees ought not to be set aside, unless it is shewn that they are not persons of integrity or of substance. *Ibid.*]

[If the assignee of a bankrupt becomes a bankrupt, the court will (on application) remove him, and he and his assignees must join with the commissioners in the first bankruptcy, in executing of new assignment. *Ex parte Newton*, T. 1749, 1 *Atkyns*, 97.]

But the commissioners in the mean time may appoint an assignee or assignees, who yet may be removed at a meeting of the creditors, if they think fit, and if removed, shall deliver up all the bankrupt's effects come to his hands, unto the new assignees then chosen, and for refusal to do so in fourteen days after notice of the new assignee chosen, and his acceptance given, in writing, under the hand and seal of the new assignee, shall forfeit 100*l.* over and above the value of such effects, &c. So, by the *st.* 5 *Geo.* 24.

[If an assignee employs an agent (without consulting the body of creditors) to receive money, and he embezzles it, the assignee shall make it good to the creditors. *Earl of Litchfield v. Williams*, M. 1737, 1 *Atkyns*, 87.]

[One assignee shall not be liable for the fault of another; but the court

court cannot determine between assignees on a petition, but only between the creditors and assignees. *Earl of Litchfield v. Williams, M. 1737, 1 Atkyns, 87.*]

(D 25.) *What he ought to do.*] By the *st. 5 Ann. 22.* the assignee shall be obliged to keep books of account of the bankrupt's estate, with liberty for any creditors to inspect them. — So, by the *st. 5 G. 24.* [So, by *5 G. 2. c. 30. s. 26.*]

[If an assignee dies before he has accounted for what he has received, the commissioners are to be considered as specialty creditors, and may come upon his real estate. *Primrose v. Bromley, M. 1739, 1 Atkyns, 89.*]

[Assignees are mere trustees, and each separately answerable only for what they receive; and therefore the words *jointly and severally* should be inserted in the assignment. *Ibid.*]

[If assignees do not divide bankrupt's effects in a proper time, but make a private advantage of them, the court will charge them with interest. *Ex parte Lane, T. 1741, 1 Atkyns, 90.*]

(D 26.) *What interest he shall have.*] By the *st. 1 Jac. 15.* the assignment of debts of the bankrupt by the commissioners shall vest a property in the assignee.

So, by the *st. 5 Ann. 22.* all the effects and estate of the bankrupt, delivered to a new assignee chosen by the creditors, shall be actually vested in him, as if the first assignment had been to him. So, by the *st. 5 Geo. 24.*

[Assignment vests all rights and possibilities of the bankrupt; an execution passes only what the sheriff seizes. *2 Vef. jun. 68.*]

[The assignees shall recover goods delivered before an act of bankruptcy, under a pretended sale, to a creditor, if not done in the course of trade, but intended merely to give a fraudulent preference. *Corwp. 629.*]

[And if the trader, in contemplation of an act of bankruptcy, send notes to even a very meritorious creditor, with intent to give a preference, the assignees may recover. *Id. 117. 124.*]

[But a payment made by a trader in the ordinary course of business, or enforced by legal diligence, tho' on eve of a bankruptcy, and tho' the bankrupt had full knowledge of his own affairs, is good. *Id. 124. 634. 1 Term Rep. 155.*]

[So, where the creditor presses for payment, and the debtor makes a mortgage of goods, and delivers possession, this is valid. *Id. 634.*]

And by the assignment of the commissioners, the property shall be vested in the assignee by relation from the first act of bankruptcy, as to the avoidance of all mesne acts. *R. 1 Sal. 111.*

And a release of a debt by a trustee for a bankrupt, made after the assignment, is of no avail. *R. Pal. 505.*

[All future personal estate is affected by the assignment, and every new acquisition will vest in the assignees; but as to future real estate, there must be a new bargain and sale. *Ex parte Proudfoot, H. 1743, 1 Atkyns, 252.*]

[Where one of three partners in a ship and cargo, pays only part of his share, and gives notes for the remainder, and before they are due becomes a bankrupt; the assignees are entitled to a full third both

of the profits and the value of the ship; and the other two partners by voluntary discharging the notes, cannot stand in the bankrupt's place, for his share of the profits. *Cowp.* 469.]

[But money owed out of *England* (as in the plantations) to a bankrupt, may be attached, by the law of the place, after the bankruptcy, for a debt due before it. *Doug.* 170.]

[If, after the assignment of a bankrupt's estate, a creditor knowing it, and residing in *England*, attach the money of the bankrupt abroad, the assignees may recover it in an action for money had and received. *Hunter v. Potts*, B. R. H. 31 Geo. 3. 4 T. R. 182. H. 35 Geo. 3. 2 H. Bl. 402. *Exchequer-Chamber*.]

[So, also if the money is attached after the act of bankruptcy, but before the assignment. *Sill v. Worswick*, C. P. T. 31 Geo. 3. 1 H. Bl. 665.]

(D 27.) *What power to discharge debtors.*] By the *st.* 4 & 5 Ann. 17. on proof before the commissioners, that mutual credit hath been between the bankrupt and his debtor, and that the accounts be open and unbalanced, they, or the assignees, may adjust the accounts, and the debtor shall not be obliged to pay more than the balance.

So, by the *st.* 5 Ann. 22. the assignees, or major part, may make composition with the debtor of the bankrupt, when it shall appear reasonable, and take such part of the debt as can be gotten on such composition, in discharge of the whole. So, by the *st.* 5 Geo. 24.

So, by the *st.* 3 Geo. 12. the clause, that a debtor shall pay no more than the balance, was enlarged for seven years.

So, by the *st.* 5 Geo. 24. where there is mutual credit, the commissioners may state the account, and the balance only shall be paid or claimed on either side. (*Vide* 5 Geo. 2. 30.)

So, before these statutes, where there were mutual dealings, the balance only should be paid. *Per Hale*, 2 Ver. 117. *Qu.* 2 Ver. 254. *per North*, 1 Mod. 215.

So, if the bankrupt, before his bankruptcy, had assigned a bond, and was indebted to the obligor, the obligor shall be allowed to deduct the debt to him against the assignee of the bond. *Semb.* 2 Ver. 428.

[If the bankrupt has stock in a company, (where there is a bye-law which subjects every member's stock to his debts to the company,) and is indebted to the company, they shall retain the stock and account only for the balance. *Gibson v. Hudson's Bay Company*, M. 12 G. Str. 1645.]

[A negotiable note of bankrupt's, indorsed to his debtor after the bankruptcy, cannot be set off. *Marsh v. Chambers*, T. 18 G. 2. Str. 1234.]

[To an action brought by the assignees of a bankrupt for a debt due to the bankrupt's estate, the defendant cannot set off cash notes issued by the bankrupt payable to bearer bearing date before his bankruptcy, unless he shews further that such notes came to his hands before the bankruptcy. *Dickson v. Evans*, B. R. M. 35 G. 3. 6 T. R. 57.]

Where there is a mutual credit, the commissioners ought to stop interest on both sides at the time of the bankruptcy, or allow it on both

both sides to the settling the account. *Bromley v. Goodere, M. 1742, 1 Atkyns, 75.*

[If one is creditor under a separate commission against *A.*, and debtor under a joint commission against *A.* and *B.*, the demand may be allowed as a set-off against the debt. *Semb. sed dub. Ex parte Edwards, M. 1745, 1 Atkyns, 100.*]

[Where a meeting of creditors is properly advertised, those who attend have a right to bind those who are absent, and may authorise assignees to compound. *Cooper v. Pepys, P. 1741, 1 Atkyns, 106.*]

[A debtor to a bankrupt before his bankruptcy, who is a creditor of the bankrupt on a contingency that takes place after the bankruptcy, shall not be at liberty to set off under the clause of mutual credits. *Ex parte Groome, T. 1744, 1 Atkyns, 115.*]

The *stat. 5 G. 2. c. 30.* extends to all mutual debts, tho' not relative to the mutual credit between the bankrupt and others in the course of trade, and tho' of such a nature as cannot be brought into a general account. *Ryall v. Rolle, H. 1749, 1 Atkyns, 185. 1 Vesey, 375.*]

[*A.* became bound as a surety for *B.*, who, in order to indemnify him, agreed that he should retain out of any money that should be due from him to *B.*, in respect to any dealings between them in trade, so much as he should pay on the bond; *B.* afterwards sold goods to *A.* of a less value than the money secured by the bond, and then became a bankrupt, and *A.* was obliged to satisfy the bond; it was holden, that this was a case within the *stat. 5 Geo. 2. c. 30. s. 28.* and that the assignees could not recover in an action for goods sold and delivered, there being nothing due on the original contract to the bankrupt's estate. *Dobson v. Lockhart, B. R. H. 33 Geo. 3. 5 T. R. 133.*]

[*A.* first purchased one, and afterwards a second parcel of goods of *B.*, each at six months credit; when the first sum became due *A.* lodged in *B.*'s hands a bill of exchange for a larger amount than the value of the goods first sold in order to pay for them, *B.* engaging to return the overplus to *A.* when the bill was paid; *B.* received the amount of the bill, and then *A.* became a bankrupt, not having paid for the second parcel of goods. It was holden in an action brought by *A.*'s assignees for the surplus of the bill, that *B.* might retain it to satisfy his demand on *A.* for the second parcel of goods. *Atkinson v. Elliott, B. R. M. 38 Geo. 3. 7 T. R. 378.*]

[Mutual credit is not confined to pecuniary demands, but extends to a creditor who has goods of the bankrupt's in his hands; as, a packer, &c. and he may retain till satisfied his full debt. *Ex parte Deeze, T. 1748, 1 Atkyns, 228.*]

[If a man is creditor of a bankrupt by simple contract, and debtor to him by bond; he may set off his demand against the principal and interest due on the bond, and pay only the balance to the assignees. *Ex parte Prescott, T. 1753, 1 Atkyns, 230.*]

[The assignee cannot compound a debt due to the bankrupt's estate, tho' recommended by the court, without a previous meeting of the creditors, in consequence of advertisement in the *Gazette*. *Warner v. Watson, P. 1737, 2 Atkyns, 7.*]

[The receipt of one assignee on payment of a debt to him is not sufficient,

sufficient; all the assignees must join to make it an absolute discharge. *Can v. Read, T. 1749, 3 Atkyns, 695.*]

(D 28.) *How the assignment shall be made.*] The assignment may be made to the creditors, who come in, of all the goods of the bankrupt, for satisfaction of their respective debts rateably.

Or, to any in trust, and for the equal benefit of all the creditors.

And if all the creditors have a joint debt, the goods may be assigned to them generally. *R. 2 Cro. 26. b.*

But a general assignment of the goods to the creditors, who have several and different debts, is not good. *R. 2 Cro. 26. b.*

(D 29.) *What remedy the assignee shall have.*] The assignee shall have the same remedy for recovery of debts due to the bankrupt, as the bankrupt himself could have.

[The right to bring a real action, *ex. gr. a writ of entry sur abatement*, passes to them by the usual words of a deed of assignment. *Smith v. Coffin, C. P. E. 35 Geo. 3. 2 H. Bl. 444.*]

[By the *stat. 1 Jac. 1. c. 15. s. 11 & 12.* and *5 Geo. 2. c. 30. s. 29.* after any person has been convicted of an indictment for falsely swearing to a debt under a commission of bankrupt, (on which indictment he is to suffer the punishment inflicted by the several statutes against perjury,) the assignees of the bankrupt may recover from him double the sum so sworn to *in an action*; in which it is sufficient to state the conviction of the defendant on the indictment, without alleging that the defendant took such false oath. *Holmes v. Walsh, B. R. H. 38 Geo. 3. 7 T. R. 458.*]

[In such an action the defendant cannot take advantage of any defect in the judgment on the indictment: that can be done only on a writ of error. *Ibid.*]

And therefore, he may have debt upon a bond, or contract made o the bankrupt. *Cro. Car. 187. 209. R. 2 Cro. 105.*

Or, action upon the case upon *assumpsit*. *Lut. 274.*

[They may bring an action of debt under the *st. 9 Ann. c. 14.* for money lost at play by the bankrupt before the bankruptcy. *Brandon v. Pate, C. P. E. 34 Geo. 3. 2 H. Bl. 308.*]

[Where a banker has paid the drafts of a person who has placed money in his hands, after notice of an act of bankruptcy committed by him, the assignees may have an action either against the banker, or against the person who has received the money with notice; but having recovered against the one, they cannot afterwards have an action for the same sum against the other. *2 Term Rep. 113, 287.*]

And the proper method is, to allege a promise to the bankrupt himself, and not to the assignee, except where an express promise is made to him after the assignment. *Per Holt, Mod. Ca. 131. R. 2 Sho. 238.*

Or, if money of the bankrupt is received by B. after the assignment, this is a new contract, and amounts to an express promise to the assignee. *Mod. Ca. 131.*

So, if the bankrupt had a judgment, the assignee may have a *scire facias* upon it. *1 Vent. 193.*

And if after the assignment, and before the *scire facias* by the assignee, the bankrupt himself sues execution, and the money is levied, the

the court will stay it in the hands of the sheriff, or in court, till the assignee sues a *scire facias*. 1 Vent. 193.

And in a *scire facias* by a bankrupt against the terre-tenant and judgment for him, if the plaintiff dies, the judgment may be entered at the request of the assignee, without any new *scire facias*, 5 Mod. 88.

So, if the goods, &c. of the bankrupt come to the hands of another, the assignee shall have *trover*; for the property is vested in him. 2 Vent. 63.

Tho' they come to his hands by force of an execution at his suit, executed after the bankruptcy. Semb. Sho. 12. 1 Sal. 111.

And he may declare generally, *quod cum possessionatus fuisset ut de bonis suis propriis*. Dub. 1 Sal. 111.

If A. and B. are joint obligees, or partners, &c. and A. becomes bankrupt, and the assignment be to B., he shall maintain an action upon the bond alone, being entitled to a moiety in his own right, and to the other moiety as assignee. Semb. per Wind. but the others dub. Ray. 7. 1 Lev. 17.

So, if a debt of A. be assigned, part to one creditor, part to another, each may sue for his part; for the statute makes a severance. Per Warb. Godb. 195, 6. Adm. cont. 1 Lev. 17.

[Assignees under a second commission cannot maintain *trover* against assignees under the first. 2 Ves. jun. 68.]

And, if the bankrupt afterwards sues for the debt, the defendant may plead, that he was a bankrupt, and that the debt was assigned. Lut. 701.

But after the commission, and before the assignment, the bankrupt may sue for his debt in his own name. Per Holt, 1 W. & M. R. 1 Sal. 108.

So, if the sheriff, &c. execute an execution by *feri facias*, teste'd before the bankruptcy, trespass does not lie against the officer, tho' the execution was executed after the commission awarded against the bankrupt. R. 1 Sid. 271. 1 Lev. 173. R. Sho. 12. 3 Mod. 236.

So, after assignment, the bankrupt may maintain trespass; for damages are uncertain, and not assignable. 2 Keb. 372.

So, covenant. 2 Keb. 372. Per two J. 1 Ca. Ch. 71.

[An attorney may practise, tho' a bankrupt, and he only can sue for his fees. 2 Ves. jun. 68.]

So, if a debt due to the bankrupt, and another be assigned, they cannot join in the suit. Adm. 1 Lev. 17, 18.

Yet a suit by a creditor for a debt, or an execution upon a judgment will be vain after the commission; for when recovered they will be liable to the commission. R. 2 Ca. Ch. 191.

By the st. 1 Jac. 15. an assignee shall maintain an action for a debt of the bankrupt, in his own name. R. 2 Cro. 105.

And therefore, it is sufficient for the assignee by his declaration to shew the debt due to the bankrupt, his bankruptcy, the commission, and assignment to him. Lut. 451.

And he need not shew, that he was declared a bankrupt by the commissioners. R. Lut. 455.

Or, that he was indebted to the value of 100*l.*, for it shall be intended, that the commission issued regularly. R. Lut. 456.

Or, that there was a petition by a creditor to the chancellor. R. Lut. 456.

Or,

Or, that notice of the assignment was given to the debtor. *R. Lut.* 456.

Or, how he became a bankrupt. *Qu. Sho.* 7. *R. Carth.* 29.

But now it is sufficient to declare shortly, without shewing the commission, and assignment at large. *R.* after verdict. *Lut.* 277.

[But when the petitioning creditor's debt is by bond, it is not sufficient, in an action by the assignees, for them to prove an acknowledgment of the debt by the bankrupt, but they must produce the subscribing witness, to prove the execution of the bond. *Doug.* 216.]

So, the assignee shall maintain an action, where the contract was made; for the privity of contract is assigned. *1 Sand.* 239.

In debt upon bond, there is no need of a *profert* of the deed; for perhaps it is not in the assignee's hands. *R. Cro. Car.* 209.

But an action by an assignee does not alter the nature of the debt: and therefore he cannot have debt against an executor or administrator upon simple contract. *R. Cro. Car.* 187. *Jon.* 223.

So, it does not prejudice the defence of the defendant. And therefore, in debt upon simple contract he shall wage his law. *R. Cro. Car.* 187. *R. 2 Cro.* 105.

So, the defendant may plead *non assumpsit* to the bankrupt within six years, where the promise is alleged to the bankrupt himself, and not to the assignee. *Per Holt, Mod. Ca.* 131.

[The assignee may declare on a promise to the bankrupt without laying any *assumpsit* to the plaintiff the assignee. *Rig v. Wilmer, P.* 12 *G. Str.* 697.]

[If collector of land-tax, with money in his hands, becomes bankrupt on 7th, on 16th commissioners of land-tax issue warrant and his goods are seized, on 17th commission of bankrupt issues, on 19th assignment is made, and on 22d the officers sell the goods; the assignees cannot recover them. *Brassie v. Dawson, T.* 7 *G. Str.* 978.]

[New assignees on death or removal of the former cannot revive a suit brought by them; but on filing supplemental bill shall be entitled to the benefit of the proceedings in it. *Anon. M.* 1739, 1 *Atkyns*, 88. 571.]

[Assignees cannot bring suit, or submit to arbitration, but by authority from majority of creditors, at a meeting advertised in *Gazette* for that purpose, for each particular case; the creditors cannot give a general authority to sue. *Ex parte Whitchurch, T.* 1742, 1 *Atk.* 91.]

[Where goods are delivered to a creditor after notice of an act of bankruptcy, the proper action for the assignee is *trover*: for there is a *tort* in detaining, tho' he came rightly to the possession of the goods. *Bourne v. Dodson, M.* 1740, 1 *Atkyns*, 154.]

[If the assignees carry on suits in equity, without authority from the major part in value of creditors at a meeting, the estate of the bankrupt is not liable to the costs. *Ex parte Whitchurch, T.* 1749, 1 *Atkyns*, 210.]

[Bankruptcy does not abate a suit. *Anon. M.* 1748, 1 *Atkyns*, 263.]

[If assignees bring *assumpsit* for goods sold, &c. defendant cannot set off a bond-debt from bankrupt. *Ryall v. Larkin, M.* 20 *G. 2.* 1 *Wilf.* 155.]

[If after writ of inquiry awarded, and before it is executed, plaintiff becomes bankrupt, and executes it in his own name, the assignees may afterwards have *scire facias quare executionem non*. *R.* on demurrer. *Hewit v. Mantel, P.* 8 *G. 3.* 2 *Wilf.* 372.] [Where

[Where a plaintiff has obtained judgment, and after a writ of error brought, he becomes bankrupt, his assignees cannot sue out a *sci. fa.* to compel an assignment of errors till some judgment be given: nor can they make themselves parties to the record in any intermediate stage of the proceeding, but it must be immediately after judgment; but an interlocutory judgment is sufficient for that purpose. 1 *Term Rep.* 463.]

[If a man commits an act of bankruptcy 4th *December*; has judgment against him, execution thereon, and his goods seized on the 5th; is declared a bankrupt on the 8th; and the sheriff sells the goods on the 28th; *trover* lies for the assignees against the sheriff. *Cooper v. Chitty*, M. 30 G. 2. 1 B. M. 20.]

[But trespass does not. 1 *Term Rep.* 475.]

[A plaintiff becomes bankrupt; money paid into court shall be paid to his assignees, they paying his attorney's bill to be taxed. *Barnes*, 145.]

[(D 30.) To what Claims Assignees are liable.]

[Trespass lies against assignees under a commission against a man not liable to be a bankrupt. 3 *Wils.* 282.]

[And where an assignee keeps money belonging to the bankrupt's estate in his hands for several years, and no dividend has been made, he must pay that money with interest and costs of suit. 1 *Brown. Ch. Rep.* 384.]

(D 30.) Distribution.

2 (D 30.) *Shall be equal.*] By the *st.* 13 *El.* 7. the commissioners may sell the lands, goods, &c. of a bankrupt, or otherwise dispose of the same, for satisfaction of the creditors, *viz.* to every of the creditors a portion, rate and rate-like, according to the quantity of his debt.

And therefore there shall be an equal distribution for the benefit of all the creditors, who are contributory, in proportion to their respective debts. R. 2 *Ca.* 25. b.

If partners agree that their several debts shall not charge the joint stock, and afterwards become bankrupts, and have several creditors, and also upon the joint stock, the creditors upon the joint stock shall not be preferred to the several creditors, but they shall be all equal; for the agreement shall take effect between themselves, and not against the creditors. R. 2 *Ca. Ch.* 139.]

[On a joint commission the partnership creditors shall be first paid out of the partnership estate, and if any surplus, the separate creditors come in for satisfaction, *viz.* the creditors of each out of his share of such surplus. *Horsley's Case*, H. 1729, 3 *P. W.* 23.]

[So *vice versa*, on a separate commission, the separate creditors first, and then the partnership creditors. *Ex parte Rowlandson*, H. 1735, 3 *P. W.* 405.]

[A. and B., partners in trade, give joint and several bond to C., and a joint commission and two separate commissions issue against them; C. shall not have a dividend under all the three commissions, but shall make his election to have satisfaction out of the partnership, or out of the separate effects. *Ibid.*]

[Where

[Where one partner had underwritten a policy of insurance on his own separate account, tho' the broker had given credit to the partnership, the debt was ordered to be proved under the *separate* estate, insurance by a partnership being against the 6 G. 1. c. 18. 1 *Brown: Ch. Rep.* 399, 400.]

[And where there is no joint estate, joint creditors shall be admitted to prove their debts, on the separate estate. *Id.* 454.]

[Where the bankrupt's estate is sufficient, creditors whose debts carry interest, shall be allowed it from the issuing the commission till they receive full satisfaction, but bonds not beyond the penalty. *Bromley v. Goodere*, M. 1743, 1 *Atkyns*, 75. *Ex parte Mills*, 2 *Ves. jun.* 295.]

[Contribution-money shall be repaid before interest. *Ibid.*]

[By *stat.* 13 *El. c.* 7. the commissioners have an equitable as well as legal jurisdiction; and therefore when petitions come before the chancellor, he proceeds by rules of equity. *Ibid.*]

[Where debts do not carry interest by the contract, the bankrupt must pay the contribution out of the surplus. 2 *Ves. jun.* 302.]

[A surety admitted to come in under the bankruptcy of his principal, as to all recovered against him, and his costs, there being a surplus. *Ibid.*]

[Assumpsit will lie for a creditor's share under an order for a dividend. *Doug.* 407.]

[And in such action, the *proceedings* under the *commission* are conclusive evidence of the debt. *Id. ibid.*]

[And the assignees cannot, in such action, *set off* a debt due to the bankrupt estate by the plaintiff. *Id. ibid.*]

[Nor, can an assignee stop a creditor's share in a dividend on account of a private debt owing to the assignee by a creditor. *Ex parte White*, H. 1742, 1 *Atkyns*, 90.]

[A creditor on a joint and several bond from *A.* and *B.*, against whom a joint commission, and a separate against *B.*, have issued; shall not have satisfaction under both at the same time, but shall make election on which he will come in in the first place; and with respect to satisfaction for the residue, he shall be postponed to all the creditors of the other estate; and he shall have time to make his election. *Ex parte Bond*, M. 1745, 1 *Atkyns*, 98. *Ex parte Banks*, T. 1740, 1 *Atkyns*, 106.]

[If the drawer and indorser of notes both become bankrupts, and the creditors receive a dividend from the indorser, they can only prove the remainder under the commission against the drawer. *Cooper v. Pepys*, P. 1741, 1 *Atkyns*, 106.]

[If a creditor under a commission, draws on the assignee to pay to *A.* a sum out of his share of the dividend when made, and the assignee accepts verbally, and before dividend becomes bankrupt himself; *A.* shall not come in *pro rata* under the assignees commission, but have the whole sum. *Ex parte Kirk*, M. 1745, 1 *Atkyns*, 108.]

[If *A.*, creditor of a bankrupt, who gave him besides bills on merchants in *Holland*, who accepted and afterwards failed and compounded, before he receives any thing under the composition, proves his whole debt, and before any dividend receives 2s. 6d. in the pound under the composition, yet he shall receive a dividend on his whole debt *pro rata* with the other creditors; and if he receives more

more on the bills than will answer 20 s. in the pound, he shall account to the assignees for the surplus. *Ex parte Wildman, M. 1750, 1 Atkyns, 109.*

[Coils of protests arisen before the commission issues, may be proved, but no part of the costs arisen afterwards. *Anon. T. 1754, 1 Atkyns, 140.*]

[If a man discounts notes at 5 l. per cent. only, he shall come in as creditor for the whole amount of the notes. *Ex parte Marlar, T. 1746, 1 Atkyns, 150.*]

[But he shall not be entitled to interest on the notes, unless expressed in the body thereof. *Ibid.*]

Partnership stock is *first* liable to the debts of the partners only, when the debt is contracted relative to the partnership, after the bankruptcy or the death of one of the parties. *Ryall v. Rolle, H. 1749, 1 Atkyns, 165. 1 Vesey, 348.*

[If there are two partners, and one takes more money from the partnership stock than his share amounts to, the partnership creditor has a right to come on his separate estate. *Ex parte Drake, M. 1725, 1 Atkyns, 225.*]

[Joint creditors, where there are no separate, may exhaust both joint and separate estates; but where there are both, the joint estate shall be applied to the satisfaction of the joint, and the separate to the satisfaction of the separate creditors. *Ex parte Hunter, H. 1742, 1 Atkyns, 223.*]

[A person entitled to an annuity from a bankrupt, shall be admitted creditor for what the value of his life *then* amounts to, and not for the whole original purchase-money. *Ex parte Le Compte, T. 1738, 1 Atkyns, 251.*]

[But where annuity creditors petitioned that the arrears of their annuities might be computed and the growing payments valued, and they might be permitted to prove debts to the amount under the commission; tho' the assignees consented, yet the court ordered that a special meeting of the creditors should be called to take their opinion, the petitioners having bought for the life of the bankrupt at five years' purchase, and coming in competition with fair debts. *1 Brown. Ch. Rep. 267.*]

[If the annuity is granted, with a penalty for non-payment, yet it shall be valued, and the annuitant admitted creditor for so much. *Ex parte Belton, T. 1744, 1 Atkyns, 251.*]

[But not till it appear whether the bond was forfeited before the act of bankruptcy. *1 Brown. Ch. Rep. 268.*]

[If navy bills are deposited with one who becomes bankrupt, interest is not allowed to run on, but a calculation made of the whole entire thing deposited, both principal and interest, according to the market price at the time of the deposit. So, of goods or any deposit. *Bromley v. Child, T. 1744, 1 Atkyns, 259.*]

[If an extent of the crown is taken out against a surety of a bankrupt, and he pays the debt, after disputing it at some expence, he shall be admitted to prove that expence as part of his debt. *Ex parte Marshall, H. 1751, 1 Atkyns, 262.*]

[If A. agrees to take 11 s. in the pound of B., who afterwards and before payment becomes a bankrupt, A. shall be admitted to prove the whole debt, and not the composition only. *Ex parte Bennett, H. 1742, 2 Atkyns, 527.*]

[If

[If *A.* indebted to *B.*, gives him bills on *C.*, who fails, and compounds with his creditors; *A.* becomes bankrupt: *B.* having received nothing under *C.*'s composition, proves his whole debt against *A.*, but before dividend made, receives 2 *s.* 6 *d.* in the pound from *C.*'s estate; yet he shall still have a dividend for the whole debt under the commission against *A.* *Ex parte Wildman*, *M.* 1750, 2 *Vesey*, 113.]

[If annuitant on bankrupt's estate has a decree for payment of arrears, and that 1700 *l.* shall be placed out to secure growing payments; the annuitant shall out of the dividends be paid the growing payments of annuity, and if any deficiency, it shall be made good by sale of sufficient part of the capital from time to time. *Ex parte Artis*, *T.* 1752, 2 *Vesey*, 489.]

(D 31.) *At what time.*] By the *st.* 1 *Jac.* 15. if after the commission sued forth, and dealt in, the bankrupt die before distribution, yet the commissioners may proceed in execution of the commission.

If the commissioners have taken contribution of any creditor, the commission is dealt in. 2 *Ca. Ch.* 193.

[If a commission issues against *A.*, and at eleven the commissioners meet and proceed, and at four sign the declaration, and at that instant have notice that *A.* died at one: this is a *dealing* within 1 *J.* c. 15. *f.* 17. and they may proceed. *Warrington v. Norton*, *H.* 9 *G.* 2. *C. T. T.* 184.]

But by the *st.* 1 *Jac.* 15. the commissioners cannot proceed to distribution till four months expired.

[If creditors bring bill against assignees in less than four months after issuing of the commission, the court will dismiss it. *Cooper v. Pepys*, *P.* 1741, 1 *Atkyns*, 106.]

(D 32.) The Advantages of the Bankrupt.

(D 32.) *He shall have information how his estate is disposed.*] By the *st.* 13 *El.* 7. and 1 *Jac.* 15. the commissioners shall on the bankrupt's request declare to him, how they have disposed his lands, goods, &c. and pay him the overplus, if any be.

[If there is a surplus of a bankrupt's separate estate, after paying his separate creditors, the joint creditors are entitled to it; for the bankrupt is not entitled to any surplus till all creditors are fully satisfied. *Ex parte Hunter*, *H.* 1742, 1 *Atkyns*, 223.]

[If an order is made to supersede a commission on the bankrupt's paying what shall be reported due by a master, and the bankrupt delays the payment for several years after the report is made, he shall pay interest from the time of the report. *Ex parte Rook*, *M.* 1753, 1 *Atkyns*, 244.]

(D 33.) *Shall not be arrested, when he attends the commission.*] So, by the *st.* 5 *Geo.* 24. it is declared, that the bankrupt going [to, staying with, or coming from the commissioners on summons, is not liable to an arrest for a debt, or on an escape warrant: but on shewing such summons, and proving it signed by the commissioners, and giving a copy of it, the officer shall discharge him, and pay him 5 *l.* a-day if he do not.

[The

[The drawers of a bill of exchange, which becomes due, and is paid by the acceptor, after the bankruptcy of the drawers, cannot be arrested by the acceptor, during the time allowed them by *stat. 5 G. 2. c. 30. s. 5.* for attending the commissioners to be examined. *Darby v. Baughan, B. R. E. 33 G. 3. 5 T. R. 209.*]

So, by the *stat. 5 G. 2. 30.* in coming to surrender, or after surrender till the time allowed for finishing his examination, unless in prison before.

[But a bankrupt, like a pauper, loses his privilege by misconduct; as, where after two petitions dismissed, he presents a third for the same purpose, it will be dismissed, and he must pay the costs, or be committed; but the court will not enjoin him from presenting any more. *Ex parte Shaw, 2 Vef. jun. 40.*]

[A bankrupt cannot be arrested by a petitioning creditor, for a commission is both an action and an execution in the first instance. *Ex parte Wilson, T. 1743, 1 Atkyns, 152.*]

[If a bankrupt is arrested by a petitioning creditor, and is charged in custody by another creditor, (the same person being attorney for both, and also clerk of the commission,) he shall be discharged of both suits, with costs from the petitioning creditor. *Ibid.*]

[A petitioning creditor determines his election by taking out the commission, and cannot sue bankrupt at law, tho' for a debt distinct from what he proved. *Ex parte Ward, M. 1743, 1 Atkyns, 153.*]

[For if he proceed at law, the commission must be superseded, which would injure the creditors who had proved under it. *Id. 154.*]

[A creditor who refuses to prove his debt under the commission, may sue the bankrupt at law, tho' he is made assignee. *Ibid.*]

[Where a party has clearly *distinct* demands against a bankrupt, he may come in under the commission for the one, and sue for the other, but not if they are only different sureties for the same debt. *1 Brown. Ch. Rep. 270.*]

[An assignee after two dividends made, on refunding what he has received, may make his election, and proceed at law against the bankrupt. *Ex parte Capot, H. 1739, 1 Atkyns, 219.*]

[A creditor three years and a half after receiving a dividend, on refunding may proceed at law against the bankrupt. *Per Eyre and Wilson, Lords Commissioners; Ashburst contra; Ex parte Wright, 2 Vef. jun. 9.*]

[A bankrupt attending the commissioners may be taken by his bail, and surrendered in discharge of bail. *Ex parte Gibbons, T. 1747, 1 Atkyns, 238.*]

(D 34.) *Shall be discharged from other debts.*] And tho' by the *stat. 13 El. 7.* the creditors, not fully satisfied, might have a remedy for the residue of their debts against the bankrupt, in like manner as they should have had before that act: and should be barred only of such part of their debts, as should be satisfied by order of the commissioners.

Now by the *stat. 4 & 5 Ann. 17.* a bankrupt, who shall surrender himself to the commissioners, and shall in all things conform to the directions of that act, (*viz.* as to the discovery of his effects, or being apprehended within 30 days after notice of the commission left

at his usual abode, and published in the Gazette, by a warrant from a judge or justice of peace, shall then conform, &c.) shall be discharged from all debts by him owing at the time when he became bankrupt. So, by the *st.* 5 *Geo.* 24. and 5 *G.* 2. c. 30.]

And by the *st.* 5 *G.* 24. he shall not be arrested for debt, or upon an escape warrant, if he attends the commissioners, or in going to, or from them; but on shewing to the officer the commissioners' summons, shall be discharged on pain of 5*l.* *per diem* to the bankrupt's own use.

[And by *st.* 5 *G.* 2. c. 30. *s.* 13. if any bankrupt after his certificate allowed and confirmed shall be taken in execution, or detained in prison, on account of any debt due *before* he became bankrupt, by reason of judgment obtained before the allowance and confirmation of his certificate, he shall be discharged without fee or reward by order of any judge of the court where the judgment was obtained.]

By the *st.* 7 *G.* 2. 31. the bankrupt shall be discharged from all bonds, notes, securities, &c. payable at a future day, as if the money had been due and payable before he became bankrupt.

[Before 7 *G.* 2. c. 31. a bankrupt was not discharged from a note payable after his bankruptcy. *Per three B. contra Price, Long v. Bland, M.* 1722, *Bunb.* 120.]

[And since the bankruptcy of the obligor does not discharge a bond conditioned for his executor to do an act depending on a contingency, as to pay money to *A.*, if the obligor marries and his wife survives him. *Tully v. Sparkes, P.* 3 *G.* 2. *Str.* 867. *Ld. Raym.* 1546. 1570.]

[So, covenant from assignee of a lease to indemnify assignor, is not discharged with respect to subsequent breaches. *Mayor v. Steward, T.* 9 *G.* 3. 4 *B. M.* 2439.]

[The bankruptcy of the defendant cannot be pleaded in bar of an action of covenant for rent. *Mills v. Auriol, C. P. T.* 30 *Geo.* 3. 1 *H. Bl.* 433. *B. R. M.* 31 *G.* 3. 4 *T. R.* 94. *Vide supra, (D 3.)*]

[*A.* draws a bill of exchange on *B.*, payable to the order of *A.*, which *B.* accepts, and *B.* draws a bill on *A.*, payable to the order of *B.*, which *A.* accepts, for their mutual accommodation. Both bills are payable at the same time, have the same dates, and contain the same sums. One is a good consideration for the other, and neither is an indemnity; so that, if either party become a bankrupt, the bill accepted by him may be proved under his commission, and consequently to an action brought on it his bankruptcy may be pleaded. *Rolfe v. Caflon, C. P. M.* 36 *G.* 3. 2 *H. Bl.* 570.]

[Bankruptcy is no bar to an action of trover, tho' the conversion happened before the bankruptcy. *Parker v. Norton, B. R. T.* 36 *Geo.* 3. 6 *T. R.* 695.]

[Where a person has his election to bring trover, or an action for money had and received, he may maintain the former notwithstanding the bankruptcy of the debtor after the cause of the action accrued, and tho' the bankruptcy would be a bar to the latter. *Ibid.*]

[Where *A.* lent his acceptances to the defendant before his bankruptcy, but which were not paid till afterwards, *A.* may maintain an action against the defendant for money paid to his use, notwithstanding his bankruptcy and certificate, and notwithstanding the defendant be-
fore

fore his bankruptcy gave his receipt to *A.*, acknowledging the receipt of so much money as the acceptances amounted to. *Snaith v. Gale*, *B. R. T.* 37 *G.* 3. 7 *T. R.* 364.]

[Nor, wherever the breach of the condition of the bond happens after the certificate. *Crookbank v. Thompson*, *M.* 15 *G.* 2. *Str.* 1160. Nor, as it seems if it happens between bankruptcy and certificate.]

[If a man having accepted a bill drawn by bankrupt on promise of indemnity is not charged in execution till after the bankruptcy, he cannot come in under the commission, and may therefore recover after the certificate. *Chilton v. Whiffing*, *T.* 8 *G.* 3. 3 *Wils.* 13.]

[*A.* bails *B.*, who promises to indemnify judgment on bail-bond against *A.* who brings error, *B.* bankrupt, judgment against *A.* affirmed, error in parliament non-profs'd. *A.* pays *B.*'s debt and costs. *B.* gets his certificate. *A.* has action against him. *Goddard v. Vanderheyden*, *M.* 12 *G.* 3. 3 *Wils.* 262.]

[So, *A.* draws bill of exchange on *B.*, payable to *A.* or order, *B.*, on promise of indemnity, accepts, *A.* becomes bankrupt, and after that *B.* pays the bill; he has action against *A.* notwithstanding his certificate. *Young v. Hockley*, *M.* 13 *G.* 3. 3 *Wils.* 346. *Vanderheyden v. Depaiba*, *H.* 14 *G.* 3. 3 *Wils.* 524.]

[If *A.* draws bills, become bankrupt, the bills are returned protested, and he sued to execution as drawer, he shall be discharged on 5 *G.* 2. c. 30. *Macarty v. Barrow*, *P.* 6 *G.* 2. *Str.* 949 *Doug.* 55.]

[Bankrupt under a joint commission, arrested by a separate creditor, shall be discharged on common bail, for he might have come in under the joint commission. *Howard v. Poole*, *M.* 8 *G.* 2. *Str.* 995.]

[Or, if he be in execution on a judgment obtained before the bankruptcy, he shall be discharged. *Wickes v. Strahan*, *T.* 14 *G.* 2. *Str.* 1157.]

[Bail on a writ of error becoming bankrupt and obtaining certificate before affirmance, is not discharged. *Hockley v. Merry*, *P.* 9 *G.* 2. *Str.* 1043. *B. R. H.* 262.]

[If one in custody for not performing an award, becomes bankrupt, and obtains his certificate, he shall be discharged; for it is a demand for which debt would lie, and he shall not be prosecuted for any debt due before the bankruptcy. *Baker's Case*, *P.* 14 *G.* 2. *Str.* 1152.]

[The certificate discharges a bankrupt from a debt accruing before the commission, tho' judgment be not obtained till after the certificate allowed. *Cowp.* 25.]

[If a debt contracted before bankruptcy, is sued for and recovered pending commission, and before certificate obtained, and afterwards judgment is affirmed on error, and costs given on the affirmance, the court on motion will discharge him as to all, on *stat.* 5 *G.* 2. c. 30. *Graham v. Benton*, *M.* 17 *G.* 2. *Str.* 1196. *Wils.* 41. [*Blandford v. Foote*, *Cowp.* 138.]

If an executor is sued on his testator's bond, becomes bankrupt, and between commission issued, and certificate attained, pleads a false plea (no assets) which is found against him, and judgment *de bonis testatoris*, *si*, &c. and *de bonis propriis* for the costs; he is not discharged by the certificate. *Howard v. Jemmet*, *H.* 3 *G.* 3. 3 *B. M.* 1368.]

[Tho' the future effects of a person twice a bankrupt are by *stat.* 5 G. 2. c. 30. liable to be seized if he has not paid 15*s.* in the pound, yet he has in the mean time such a property in them, as enables him to sell to a *bonâ fide* purchaser. *Ashley v. Kell*, P. 17 G. 2. Str. 1207.]

[A person against whom a second commission of bankrupt has been issued, and who has not paid 15*s.* in the pound, is (by *stat.* 5 G. 2. c. 30. *s.* 9.) liable to an action by any of his creditors, though they may have signed his certificate. *Philpot v. Corden*, B. R. T. 33 G. 3. 5 T. R. 287.]

[If a defendant rely on a certificate under a second commission of bankrupt against him, under which he has not paid 15*s.* in the pound, the plaintiff, in order to deprive him of the benefit of it, may produce the proceedings under the former commission, and prove that defendant submitted to it, without proving the trading, the act of bankruptcy, and the other facts which are necessary to support the commission against third persons. *Haviland v. Cook*, B. R. T. 34 G. 3. 5 T. R. 655.]

[If a bankrupt has a certificate under a joint commission, it discharges him from separate as well as joint debts; for separate creditors may come in under a joint commission. *Twiss v. Massy*, H. 1737, 1 Atkyns, 67.]

[Yet the commissioners cannot admit separate creditors to prove their debts under a joint commission, without the sanction of the court. *Ex parte Sandon*, H. 1743, 1 Atkyns, 68.]

[The allowance of the bankrupt's certificate does not discharge his sureties in securities, but they may be proceeded against notwithstanding. *Ex parte Williamson*, H. 1750, 1 Atkyns, 82.]

[And if the surety of a bond pay the debt after the bankruptcy of the principal, he is not barred by the certificate, tho' the forfeiture was before it. *Cowp.* 525. 1 Term Rep. 599.]

[And if the bankrupt, in consideration of a debt due before the bankruptcy, for which a creditor agrees to accept no dividend, undertake to make such creditor a satisfaction for the whole, or in part, the certificate is no bar to an *assumpsit* on such undertaking. *Cowp.* 544.]

[So, neither is a bond and warrant of attorney to confess judgment given by a bankrupt after his bankruptcy, in order to obtain his liberty, barred by his certificate, altho' the original debt were contracted before. 1 Term Rep. 715.]

[By *stat.* 19 G. 2. c. 32. bankrupt is discharged from debts on bottomree or respondentia bonds, or policies of insurance, where the loss or contingency happens after the commission issues, as if it had happened before.]

[If a trader underwrite a policy of insurance on a life, and afterwards and before the loss by the death of the party, become a bankrupt, the demand is discharged by his certificate by virtue of the *enacting* words of this act. *Doug.* 166.]

[But debts which, at the time of the bankruptcy, may never become due, (not within the statute,) cannot be proved under the commission, and therefore are not discharged by the certificate. *Doug.* 165.]

[A bankrupt who has been discharged before under a former commission,

commission, and also under an insolvent act, and who has not paid 15 s. in the pound under a second commission, tho' his goods shall be liable, yet he may have a certificate as to his body. *Ex parte Green*, T. 1746, 1 *Atkyns*, 257.]

[A bankrupt conforming in all things, cannot be discharged from a commitment under an extent of the crown. *Anon. M.* 1745, 1 *Atkyns*, 262.]

[A person may prove a debt in right of his wife, and yet bring an action at law for a debt due to him in his own right. *Ex parte Matthews*, M. 1754, 3 *Atkyns*, 816.]

[If judgment is obtained against a bankrupt, the principal in a bail-bond, his certificate obtained subsequent to the judgment shall not discharge it, tho' it discharges the original debt. *Cockerill v. Owsston*, M. 31 G. 2. 1 B. M. 436.]

[If a bankrupt is rendered in discharge of bail after judgment, and afterwards has his certificate allowed, he shall be discharged. *Barnes*, 368.]

[So, if taken in execution. *Barnes*, 386.]

[But by the *st.* 10 *Ann.* 15. the discharge of a bankrupt from his debt shall not be construed to release any other person, who was partner in trade, or jointly bound, or liable to same debt with the bankrupt.]

So, if the bankrupt does not plead his discharge, but suffers judgment against him for a debt before his bankruptcy, he shall not be aided by an *audita querela*, nor in equity. *R.* 2 *Ver.* 697.

So, if he be taken in execution, during the time that his certificate is depending before the judges, he shall not be aided upon motion, without an *audita querela*. 2 *Ver.* 697.

So, by the *st.* 5 G. 2. 30. if the creditors be not paid 15 s. in the pound, he shall afterwards be liable to the creditors, except as to his body, tools of his trade, household goods, and furniture, and apparel of himself, wife, and children.

[And tho' a *prior* commission has been superseded by consent, a certificate under a second bankruptcy does not protect effects, unless the bankrupt pay 15 s. in the pound, under the second commission. *Deug.* 46.]

(D 35.) *And shall plead it generally.*] And by the *st.* 4 & 5 *Ann.* 17. if the bankrupt shall be afterwards arrested, or impleaded for a debt due before he became bankrupt, he shall be discharged on common bail, and may plead in general, that the cause of such action did accrue before he became bankrupt, and may give the act and special matter in evidence, and the plaintiff being nonsuit, or having a verdict, or judgment against him, shall pay costs. But this act expired 26 June 1716.

So, by the *st.* 3 *Geo.* 12. this extends to bankrupts against whom a commission issued on or before 26 June 1716, who had discovered their effects, &c. or should do so before 25th December next ensuing. So, by the *st.* 5 G. 2. 24. for seven years longer. And by the *st.* 5 G. 2. 30. for three years longer.

[And such a plea need not be signed by counsel. *Leigh v. Monteiro*, B. R. M. 36 G. 3. 6 T. R. 496.]

[A general plea of bankruptcy in Ireland, and referring to an Irish act

act of parliament; and concluding to the country, is bad. *Quin v. Keefe*, C. P. M. 36 Geo. 3. 2 H. Bl. 553.]

If there be a joint commission against *A.* and *B.*, and the one be sued by a separate creditor, he shall plead generally, &c.; for after distribution of the joint stock of the joint creditors, the share of each out of the residue shall be to the separate creditors. *Semb. F. g.* 283.

But a bankrupt cannot plead the general issue.

So, it is not sufficient to say, that he became bankrupt, and the cause of action accrued before, without saying, *quod vigore statuti* he pleads this; for the statute does not enable him to plead the general issue, but to plead generally, that the cause of action accrued before the bankruptcy; and therefore he ought to shew, that he pleads this by force of the statute. *R. in C. B. Pasf.* 10 Ann. inter *Fyson* and —, Com. 205.

[The bankrupt must prove an act of bankruptcy as well as produce his certificate, notwithstanding *stat.* 5 G. c. 24. s. 30. *Lock v. Major*, M. 9 G. Str. 533.]

[The plea must set forth the names and debts of the petitioning creditors. *Tully v. Sparkes*, M. 2 G. 2. Ld. Raym. 1546.]

[On a general plea of bankruptcy under 5 G. 2. c. 3. to an action on a bond, the plaintiff may give in evidence the condition, without having set it out on the record, to shew that the action is not barred by the certificate. *Doug.* 160.]

[A plea of bankruptcy under this statute must state that the cause of action accrued before the bankruptcy; stating that an indenture on which an action of covenant is founded, was executed prior to the bankruptcy is not sufficient. *Charlton v. King*, B. R. H. 31 G. 3. 4 T. R. 156.]

[After issue joined, and *venire* awarded, he may plead *puis darrein continuance* on the *quarto die post* the return of the *venire*; and altho' he does not allege that he has conformed, and obtained his certificate, yet if verified by affidavit it cannot be rejected on motion, or determined bad but on demurrer. *Paris v. Salkeld*, H. 2 G. 3. 2 Wilf. 137.]

[But such plea, if it does not aver that defendant has conformed, &c. is bad on demurrer. *Paris v. Salkeld*, P. 2 G. 3. 2 Wilf. 139.]

So, he shall not be discharged from a bond made before his bankruptcy to pay to his wife, if she survive, 400 l. in two months after his death; for it was not due before. *R. inter Sparks and Tully in B. R. and afterwards in Error*, Trin. 3 Geo. 2. (2 Ld. Raym. 1546. 1570.)

[Where a bond conditioned for the payment of a sum of money, by a *principal* and *surety*, has not been forfeited till after the bankruptcy of the *surety*, the debt cannot be proved under his commission, and therefore his certificate is no bar to an action on such bond, *Doug.* 160.]

[So, if *A.*, at the instance of a trader, accept a bill payable to his order, not having any effects of the trader in his hands, and the trader become a bankrupt before the bill become due, and *A.* pay it when it becomes due, to an *indorsee*, it is not a debt against the trader, till actually paid, and therefore is not discharged by his certificate. *Doug.* 166.]

So, the bail of a bankrupt shall not be discharged. *R. 2 Mod. Ca.* 348.

[To

[To *assumpsit* by several partners the defendant may plead in bar the bankruptcy of one of them. *Eckhardt v. Wilson*, B. R. H. 39 Geo. 3. 8 T. R. 140.]

(D 36.) *Shall have a share of the neat produce.*] So, by the *stat. 4 & 5 Ann. 17.* a bankrupt surrendering, and conforming to the said act, shall have 5*l. per cent.* paid him by the assignees out of the neat product of the estate received on such discovery, so as such sum amount not in the whole to above 200*l.*—So, by the *stat. 5 G. 24.* and 5 G. 2. 30.

And so as the creditors of the bankrupt be paid 8*s.* in the pound, at least, above all charges; for in such case he shall be allowed only what the assignees, or the major part of the commissioners, think fit.

And tho' this statute expired 26 June 1716, by the *stat. 3 Geo. 12.* it was extended to all bankrupts, against whom a commission issued on or before 26 June 1716, who shall discover effects, &c. before 25 December then next.

By the *stat. 5 Geo. 2. 30.* if the creditors are not paid 10*s.* in the pound, the bankrupt shall be allowed only what the assignees and commissioners think fit, not exceeding 3*l. per cent.*

If paid 12*s. 6d.* in the pound, then 7*l. 10s. per cent.* so as it amount not to above 250*l.* If paid 15*s.* in the pound, then 10*l. per cent.* so as it exceed not 300*l.*

[A bankrupt is not entitled to his allowance till he has had his certificate; therefore tho' he surrender and conform, yet if he dies before his certificate, his representative shall have nothing. *Ex parte Grier*, T. 1744, 1 *Atkyns*, 207.]

[But he is not entitled to any maintenance out of his effects during his examination; and if any person during that time take any thing from them, and convert it into money, tho' for the necessary subsistence of the bankrupt and his family, the assignees may maintain trover against such person. 1 *Term Rep.* 157.]

[But the allowance is a vested interest, and shall go to the representative. *Ex parte Trap*, M. 1747, 1 *Atkyns*, 208. *Ex parte Calcot*, T. 1754, 3 *Atkyns*, 814.]

[The court will order the assignees to pay the allowance to the representative of a bankrupt who has paid 10*s.* in the pound. *Ex parte Calcot*, T. 1754, 1 *Atkyns*, 209.—*Nota*; It does not appear whether the deceased bankrupt had had his certificate or not: if not, it overrules the determination in *Grier's case*, *supra*.]

[A bankrupt cannot call on his assignees for this allowance if his certificate be not granted before payment of the dividends. *Groome v. Potts*, B. R. H. 36 Geo. 3. 6 T. R. 548.]

[Bankrupt is not entitled to allowance, till after a final dividend. *Ex parte Stiles*, H. 1748, 1 *Atkyns*, 208.]

[The bankrupt's allowance shall, in the case of partners, be divided between them in the proportions in which their respective effects have contributed to the payment of the debts, 1 *Brown, Ch. Rep.* 452.]

(D 37.) *But the bankrupt shall have no advantage; unless he has his certificate allowed.*] But by the *stat. 4 & 5 Ann. 17.* a bankrupt shall not have the benefit of that act, unless a major part of the commis-

act of parliament; and concluding to the country, is bad. *Quin v. Keefe, C. P. M. 36 Geo. 3. 2 H. Bl. 553.*

If there be a joint commission against *A.* and *B.*, and the one be sued by a separate creditor, he shall plead generally, &c.; for after distribution of the joint stock of the joint creditors, the share of each out of the residue shall be to the separate creditors. *Semb. F. g. 283.*

But a bankrupt cannot plead the general issue.

So, it is not sufficient to say, that he became bankrupt, and the cause of action accrued before, without saying, *quod vigore statuti* he pleads this; for the statute does not enable him to plead the general issue, but to plead generally, that the cause of action accrued before the bankruptcy; and therefore he ought to shew, that he pleads this by force of the statute. *R. in C. B. Pasf. 10 Ann. inter Fyson and —, Com. 205.*

[The bankrupt must prove an act of bankruptcy as well as produce his certificate, notwithstanding *stat. 5 G. c. 24. s. 30. Lock v. Major, M. 9 G. Str. 533.*]

[The plea must set forth the names and debts of the petitioning creditors. *Tully v. Sparkes, M. 2 G. 2. Ld. Raym. 1546.*]

[On a general plea of bankruptcy under 5 G. 2. c. 3. to an action on a bond, the plaintiff may give in evidence the condition, without having set it out on the record, to shew that the action is not barred by the certificate. *Doug. 160.*]

[A plea of bankruptcy under this statute must state that the cause of action accrued before the bankruptcy; stating that an indenture on which an action of covenant is founded, was executed prior to the bankruptcy is not sufficient. *Charlton v. King, B. R. H. 31 G. 3. 4 T. R. 156.*]

[After issue joined, and *venire* awarded, he may plead *puis darrein continuance* on the *quarto die post* the return of the *venire*; and altho' he does not allege that he has conformed, and obtained his certificate, yet if verified by affidavit it cannot be rejected on motion, or determined bad but on demurrer. *Paris v. Salkeld, H. 2 G. 3. 2 Wils. 137.*]

[But such plea, if it does not aver that defendant has conformed, &c. is bad on demurrer. *Paris v. Salkeld, P. 2 G. 3. 2 Wils. 139.*]

So, he shall not be discharged from a bond made before his bankruptcy to pay to his wife, if she survive, 400 *l.* in two months after his death; for it was not due before. *R. inter Sparks and Tully in B. R. and afterwards in Error, Trin. 3 Geo. 2. (2 Ld. Raym. 1546. 1570.)*

[Where a bond conditioned for the payment of a sum of money, by a *principal* and *surety*, has not been forfeited till after the bankruptcy of the *surety*, the debt cannot be proved under his commission, and therefore his certificate is no bar to an action on such bond, *Doug. 160.*]

[So, if *A.*, at the instance of a trader, accept a bill payable to his order, not having any effects of the trader in his hands, and the trader become a bankrupt before the bill become due, and *A.* pay it when it becomes due, to an *indorsee*, it is not a debt against the trader, till actually paid, and therefore is not discharged by his certificate. *Doug. 166.*]

So, the bail of a bankrupt shall not be discharged. *R. 2 Mod. Ca. 348.*

[To

[To *assumpsit* by several partners the defendant may plead in bar the bankruptcy of one of them. *Eckhardt v. Wilson*, B. R. H. 39 Geo. 3. 8 T. R. 140.]

(D 36.) *Shall have a share of the neat produce.*] So, by the *stat. 4 & 5 Ann. 17.* a bankrupt surrendring, and conforming to the said act, shall have 5*l. per cent.* paid him by the assignees out of the neat product of the estate received on such discovery, so as such sum amount not in the whole to above 200*l.*—So, by the *stat. 5 G. 24.* and 5 G. 2. 30.

And so as the creditors of the bankrupt be paid 8*s.* in the pound, at least, above all charges; for in such case he shall be allowed only what the assignees, or the major part of the commissioners, think fit.

And tho' this statute expired 26 June 1716, by the *stat. 3 Geo. 12.* it was extended to all bankrupts, against whom a commission issued on or before 26 June 1716, who shall discover effects, &c. before 25 December then next.

By the *stat. 5 Geo. 2. 30.* if the creditors are not paid 10*s.* in the pound, the bankrupt shall be allowed only what the assignees and commissioners think fit, not exceeding 3*l. per cent.*

If paid 12*s. 6d.* in the pound, then 7*l. 10 s. per cent.* so as it amount not to above 250*l.* If paid 15*s.* in the pound, then 10*l. per cent.* so as it exceed not 300*l.*

[A bankrupt is not entitled to his allowance till he has had his certificate; therefore tho' he surrender and conform, yet if he dies before his certificate, his representative shall have nothing. *Ex parte Grier*, T. 1744, 1 Atkyns, 207.]

[But he is not entitled to any maintenance out of his effects during his examination; and if any person during that time take any thing from them, and convert it into money, tho' for the necessary subsistence of the bankrupt and his family, the assignees may maintain trover against such person. 1 Term Rep. 157.]

[But the allowance is a vested interest, and shall go to the representative. *Ex parte Trap*, M. 1747, 1 Atkyns, 208. *Ex parte Calcot*, T. 1754, 3 Atkyns, 814.]

[The court will order the assignees to pay the allowance to the representative of a bankrupt who has paid 10*s.* in the pound. *Ex parte Calcot*, T. 1754, 1 Atkyns, 209.—*Nota*; It does not appear whether the deceased bankrupt had had his certificate or not: if not, it overrules the determination in *Grier's case*, *supra*.]

[A bankrupt cannot call on his assignees for this allowance if his certificate be not granted before payment of the dividends. *Groome v. Potts*, B. R. H. 36 Geo. 3. 6 T. R. 548.]

[Bankrupt is not entitled to allowance, till after a final dividend. *Ex parte Stiles*, H. 1748, 1 Atkyns, 208.]

[The bankrupt's allowance shall, in the case of partners, be divided between them in the proportions in which their respective effects have contributed to the payment of the debts, 1 Brown, Ch. Rep. 452.]

(D 37.) *But the bankrupt shall have no advantage; unless he has his certificate allowed.*] But by the *stat. 4 & 5 Ann. 17.* a bankrupt shall not have the benefit of that act, unless a major part of the commis-

sioners, by writing under their hands and seals, certify the lord chancellor, that the bankrupt hath made full discovery of his effects, and in all things conformed to the directions of the act, and that they see no reason to doubt the truth of it: and unless such certificate be confirmed by the lord chancellor, or two judges to whom he shall refer it, before whom the creditors may be heard against the making, or confirmation of the certificate.

Nor, by the *stat. 5 Ann. 22.* unless the allowance to the bankrupt, and the certificate, be signed by four parts in five in number and value of the creditors, who have proved their debts.—So, by the *stat. 5 G. 24.* and *5 G. 2. 30.* of creditors for 20*l.*

And a bond or agreement by the bankrupt, or any other, &c. to induce a creditor to consent to such allowance or certificate, shall be void.—So, by the *stat. 5 Geo. 24.* and *5 Geo. 2. 30.* (*f. 11.*)

[A bankrupt shall not be discharged upon a common appearance for a debt due before the bankruptcy, if it is shewn that his certificate was procured by fraudulent means. *Vincent v. Brady, C. P. M. 32 Geo. 3. 2 H. Bl. 1.*]

[An agreement to pay money to the assignees of a bankrupt, on his certificate being allowed, tho' for the benefit of all the creditors, is void under this last-mentioned act. *Doug. 695.*]

[And if a creditor has taken money for signing a bankrupt's certificate, it shall be recovered in an action for money had and received, because of the oppression. *Doug. 472. 696.*]

[If some of the bankrupt's creditors are induced by money to sign the certificate, tho' the bankrupt does not know of it at the time of their signing, nor even when he makes the necessary affidavit, in order to obtain the allowance by the chancellor, yet if he know it before the actual allowance, the certificate is void. *Doug. 228.*]

[If money be given without the bankrupt's privity, to induce creditors to sign, in order to deprive him of the effect of his certificate, and sufficient in number and value have signed, exclusive of those who have taken money, the certificate shall be valid: but if, in such case the necessary number and value be not complete, exclusive of those who have taken money, it shall be void. *Doug. 230.*]

[A bond given to a creditor of a bankrupt, in order to induce him to withdraw a petition, which he had preferred to the chancellor against the allowance of the certificate, is void. *Sumner v. Brady, C. P. T. 31 Geo. 3. 1 H. Bl. 647.*]

[If any one of a bankrupt's creditors, tho' without the bankrupt's knowledge, be induced by money to sign his certificate, it is void. *Holland v. Palmer, C. P. M. 38 Geo. 3. 1 Bos. & Pull. Rep. 95.*]

The certificate of the commissioners ought regularly to mention, that the party became bankrupt since the *stat. 4 & 5 Ann. 17.* commenced, viz. since the 24 June 1706. *1 Sal. 111.*

[And till the certificate allowed he is not entitled to have an execution, against his goods, for a debt accruing before the bankruptcy, set aside, tho' it had been signed by the creditors. *1 Term Rep. 361.*]

And if the certificate be silent, and proof is made that he was a bankrupt before, the certificate shall be disallowed. *R. 1 Sal. 111.*

If the chancellor refers the certificate to the judges, they may examine witnesses upon it *viva voce.* *R. 1 Sal. 112.*

And

And make out summons for the witnesses. *R. 1 Sal. 112.*

And they ought to examine the witnesses *viva voce*, if there are such. *Ibid.*

If there are not, they may inform themselves by affidavits filed in Chancery, and sworn before a master extraordinary. *Ibid.*

Or, by affidavits before themselves. *Ibid.*

[The statutes of bankrupt do not bind the crown; therefore a bankrupt, tho' he has obtained his certificate, may be arrested on a bond to the crown. *Rex v. Pixley, M. 1725, Bunb. 202.*]

[On a joint commission against two partners, the separate creditors, tho' they have taken out separate commissions, may come in, prove their debts, and oppose allowing certificate on the joint commission. *Horsey's Case, H. 1729, 3 P. W. 23.*]

[If bankrupts obtain their certificate under a joint commission, it bars their separate creditors. *Ibid.*]

[If a certificate is stayed on petition of a claimant suggesting collusion in the bankrupt, and it be referred to the commissioners to inquire and certify, and they certify that they are satisfied, and that four-fifths of the creditors have signed; and then new creditors prove debts, so that the signing creditors are not now four-fifths, but they do not join in the petition against the certificate, it shall be allowed, and the claimant or his representative left to his bill; and if any thing is recovered (beyond mortgage money) it shall be applied to the creditors at large. *Ex parte Fydell, M. 1741, 1 Atkyns, 73.*]

[A certificate allowed in the bankrupt's life is good, tho' not confirmed by the chancellor till after his death; and then has its effect from the beginning. *Bromley v. Goodere, M. 1743, 1 Atkyns, 75.*]

[But a certificate only discharges the bankrupt's person and his estate subsequently accrued; and not his estate vested in the assignees at the time of obtaining the certificate, which shall be liable to pay interest (on debts carrying interest) accruing after the certificate allowed, till full satisfaction. *Ibid.*]

[The certificate shall not be stayed on petition of persons whose demands are not liquidated, and who do not swear there will a balance in their favour, and the bankrupt swears it will be in his favour. *Ex parte Johnson, M. 2745, 1 Atkyns, 81.*]

[The allowance of certificates is discretionary, first in the commissioners, and then in the chancellor, and a *mandamus* will not lie to compel it. *Ex parte Williamson, H. 1750, 1 Atkyns, 82.*]

[No person who does not prove a debt, or shew reasonable ground for claim, is within the rule for assenting or dissenting to a certificate. *Ibid.*]

[If a bankrupt is a trader in Ireland, signing his certificate in three months after the commission issues, is too precipitate. *Ibid.*]

[Or, even in England; and the chancellor on application will stay it, such hasty proceedings inverting the very intention of the statutes. *Anon. M. 1753, 1 Atkyns, 84. Ex parte Saufmarez, M. 1754, 1 Atkyns, 84.*]

[A person who has a debt in his own name, and another as executor, cannot sign the certificate as two persons, but he may, for the amount of the two sums as his own particular debt. *Ex parte Saufmarez, M. 1754, 1 Atkyns, 84.*]

[Where there is a joint and a separate commission, a creditor under the

the joint may come under the separate, and assent or dissent to the certificate under it. *Ex parte Turner*, T. 1742, 1 *Atkyns*, 97.]

[A creditor, who makes his election to proceed against the person, may come in and prove his debt under the commission, so as to assent or dissent to the certificate. *Ex parte Capot*, H. 1739, 1 *Atkyns*, 219. *Ex parte Lindsey*, M. 1745, 1 *Atkyns*, 220. *Ex parte Dorvilliers*, T. 1751, 1 *Atkyns*, 221.]

[Tho' the allowance of certificate by lord chancellor is matter of judgment, yet not arbitrary, but he must proceed by the rules of the statutes; and if these are complied with, he will not disallow it on suspicion. *Ex parte Williamson*, H. 1750, 2 *Vesey*, 249.]

[Creditors who have not proved their debts, and much less those who have not claimed them by affidavit under the commission, are not entitled to oppose allowance of certificate, tho' they are plaintiff's in suits of equity against the bankrupt. *Ibid.*]

[By *stat. 24 Geo. 2. c. 57.* if any person fraudulently swears to a false debt, and signs the certificate, such certificate shall be void unless the bankrupt discloses the fraud in writing before the commissioners have signed it.]

[Creditor abroad may by letter of attorney, attested by notary public, empower a person to sign certificate.]

[Bankrupt ought not to trade pending a commission. 2 *Vesey jun.* 68.]

(D 38.) *If he have given extravagant portions to his children, or lost at play.* So, by the *stat. 4 & 5 Ann. 17.* a bankrupt shall not have benefit of the act, who hath, on the marriage of any of his children, given above 100 *l.*, unless he make it appear he was worth above the sum so given, sufficient to satisfy all his creditors their full debts. So, by the *stat. 5 Geo. 24.*

[The clause of 5 *G.*, as to giving above 100 *l.* marriage-portion with a child, must be construed strictly, and not extend to a niece. *Ex parte Saumarez*, M. 1754, 1 *Atkyns*, 84.]

Or, who hath lost 5 *l.* in one day, or 100 *l.* in the whole in 12 months preceding his bankruptcy in play at cards, dice, tables, tennis, bowls, shovel-board, cock-fighting, racing, dog-matches, or other pastimes, or games, or in bearing part of stakes, or betting on the side of such as did play. So, by the *stat. 5 Geo. 24.*

[Insuring in the lottery is not gaming within the meaning of the act. *Lewis v. Piercy*, C. P. T. 28 *Geo. 3.* 1 *H. Bl.* 29.]

When a bankrupt shall be aided in equity, and when not, *vide in Chancery*, (2 *L* 1, 2.)

(D 39.) How a Commissioner, &c. may plead.

By the *stat. 1 Jac. 15.* in trespass, or other suit against a commissioner, or other having authority by a commission of bankruptcy, he may plead, *not guilty*, or justify, that he acted by authority of the acts against bankrupts, without shewing the commission, or other circumstance; to which the plaintiff may reply, *de son tort*, &c. and the special matter may be given in evidence.

So, by the *stat. 4 & 5 Ann. 17.* any person sued by action, information, &c. for any thing done in prosecution of the said act, may plead the general issue, and give the special matter in evidence.

(D 40.)

(D 40.) Expences of the Commission.

By the *st.* 4 & 5 *Ann.* 17. no monies shall be paid, or allowed out of the estate of the bankrupt, for expences for eating or drinking of the commissioners, or any others, at any of their meetings, &c.—So, by the *st.* 5 *Geo.* 24.

And by the *st.* 5 *Geo.* 24. no commissioner shall take above 20*s.* for any meeting, or for executing any deed, or above 10*s.* for any warrant of seizure or distribution.

(D 41.) When the Commission may be superseded.

[Where there is a doubt of the bankruptcy, and the bankrupt is out of the kingdom, the court will not supersede the commission on petition, but direct an issue; if the bankrupt is at home will send it to commissioners to re-consider. *Ex parte Gulsion*, T. 1753, 1 *Atkyns*, 193.]

[A commission of bankrupt is *ex debito justitiæ*, and is never superseded without directing an issue, unless it appears very plainly to be fraudulently or vexatiously taken out. *Ex parte Wilson*, M. 1752, 1 *Atkyns*, 218.]

[If the bankrupt surrenders, and acquiesces a long time, (as a year and a half,) the court will not direct an issue tho' the case is doubtful, but will leave him to bring *trover* against the assignee. *Ex parte Nutt*, T. 1743, 1 *Atkyns*, 102.]

If the commission of bankruptcy takes effect, and all the creditors who appear have a satisfaction, the chancellor by their assent may supersede it. 2 *Ca. Ch.* 144. *Dub. Sho.* 200.

Tho' it be within four months, and there are other creditors who would afterwards appear. *Semb.* 2 *Ca. Ch.* 144. 191.

So, if the creditors who petition pray that it be superseded, it shall be superseded within the four months, tho' there are other creditors who afterwards pray a commission. *R.* 1 *Ver.* 208.

Tho' the creditors, who had petitioned, compound with the heir, the bankrupt himself being dead. 1 *Ver.* 209.

[So, all the creditors being paid, and consenting, except two who could not be found; but whose securities were delivered up with receipts on them, and their signatures proved. *Ex parte King*, 2 *Ves. jun.* 40.]

[Tho' a majority of creditors agree to certify that a commission ought to be superseded, yet if one creditor says, I shall be able to prove in a few days, and desires a delay, the court will not supersede till he has had an opportunity of proving. *Ex parte Crisp*, T. 1744, 1 *Atkyns*, 133.]

[*A.*, *B.*, and *C.* are partners in a joint undertaking which *B.* and *C.* want to get into their own hands, and therefore procure a commission against *A.* for a debt due against all three jointly, a provisional assignment to await a trial directed, several debts proved, all but a trifle the partnership debts: *B.* and *C.* in the mean time receive more from the undertaking than sufficient to pay all the joint creditors, and give them all, since proving their debts, satisfaction, or security; on *A.*'s application, the court will order, that on his paying in a month all the debts proved under the commission, the costs of it, and the proceedings at law, the commission be superseded; that the

the creditors assign the securities given them to a trustee in trust, to secure to *A.*, *B.*, or *C.* the money they have paid towards such debts, above their respective proportion thereof; that the assignees re-assign to *A.*, and account and pay him the balance in their hands: but if *A.* makes default in payment, the commission to proceed. *Ex parte Crisp, T. 1744, 1 Atkyns, 133.*]

[*A.* and *B.* are partners for a special purpose, *A.*, *B.*, and *C.* are also partners, and a commission issues against *A.* and *B.*; *A.* dies; a second commission issues against *B.*, and *B.* dies; a separate commission issues against *C.*; this last commission shall be superseded, and (by consent) the first, and separate accounts kept of the several estates, and the disposition of the effects reserved to the court. *Sympton's Bankrupt, M. 1752, 1 Atkyns, 137.*]

[From this, it would seem, that where there is a joint commission, separate creditors ought not to take out a separate one, yet it is still frequently done.]

[The practice is now to blend joint and separate commissioners together to lessen expences. *Ex parte Brown, 2 Ves. jun. 69.*]

[If one against whom a commission has issued, is found no bankrupt by verdict at law, the commission shall be superseded, and the costs at law and in equity, and of the superseedeas, shall be paid by the petitioning creditor. *Ex parte Gullson, H. 1753, 1 Atkyns, 139.*]

[When a commission is superseded, if the case is doubtful the court will direct an inquiry before a master of the damages sustained by bankrupt, or a *quantum damnificatus* at law, and then order the bond given by petitioning creditor to be assigned to bankrupt; but in a flagrant case will assign the bond without the delay of such previous injury. *Ex parte Gayter, M. 1749, 1 Atkyns, 144.*]

[If after certificate obtained, all the creditors release the bankrupt from all further demands, the court will not supersede the commission, for that would entirely defeat the certificate, but will direct the bankrupt to stand in the place of the assignees to get in the remainder of debts, on indemnifying them. *Ex parte Leaverland, H. 1751, 1 Atkyns, 145.*]

[Where a commission has been proceeded upon in the usual manner, and all parties acquiesced, and the whole finished, the court will not supersede it, tho' it is doubtful what the act of bankruptcy was committed before the petitioning creditor's debt arose. *Ex parte Desanctus, T. 1753, 1 Atkyns, 145.*]

[If a commission issues against an infant, it shall be superseded; for an infant cannot be a bankrupt. *Ex parte Sydebotham, T. 1742, 1 Atkyns, 146.*]

[*A.* treats with *B.* for purchase of equity of redemption of his estate then in mortgage, pays part to *B.* to clear off the mortgage, and is to pay the residue on executing conveyances; *B.* refuses to complete purchase or pay off mortgage; *A.* brings action for the money paid; *B.* lies two months in gaol; *A.* takes out commission, and *B.* is declared bankrupt; and after the commission issued, *A.* takes an assignment of the mortgage: the commission shall be superseded, and the petitioning creditor pay costs. *Ex parte Hylliard, T. 1751, 1 Atkyns, 147.*]

[If a person is declared bankrupt, on general evidence on being denied, and it appears afterwards that it was at eleven at night, the commission

commission shall be superseded with costs. *Ex parte Hall, M. 1753, 1 Atkyns, 201.*

[Where the bankrupt has not surrendered in time, and there appears no intention of defrauding, the chancellor may supersede the commission to prevent prosecution. *Ex parte Wood, T. 1751, 1 Atkyns, 221.*]

[In general if a second commission issues before the bankrupt has his certificate under the first, it shall be superseded; for it ought not to issue, as the bankrupt is incapable of acting. *Ex parte Proudfoot, H. 1743, 1 Atkyns, 252. Cowp. 823. Ex parte Brown, 2 Ves. jun. 67.*]

[But if the assignees, and several creditors of the first, have assented to the certificate under the second, and nothing clandestine appears, and it has been acquiesced in for some years, the court will not then supersede the second on the application of some creditors under the first. *Ibid.*]

[Consent, fraud, or laches in the creditors under the first, will support the second, and supersede the first; so the assignees under the second paying the creditors under the first 20s. in the pound, and all costs. *Ex parte Brown, 2 Ves. jun. 67.*]

So, the commission abates by the death of the king. *2 Ca. Ch. 192.*

[But now by *stat. 5 G. 2. c. 30. s. 45.* no commission of bankrupt shall abate by reason of the death of the king.]

So, if all the commissioners die except two, where the commission is to three or more, there shall be a new commission.

But if a *superfedeas* be granted by surprise, it may be discharged. *R. 2 Ca. Ch. 144.*

So, if the commission abate, or be superseded to the prejudice of any creditors, a new commission may be granted. *R. 2 Ca. Ch. 193.*

If a new commission be granted, the new commissioners shall proceed, where the old ended. *2 Ca. Ch. 193.*

B A R.

Bar of Estate.

Vide Chancery, (4 S 4.)—Copyhold, (C 9.)—Estates, (B 22. 25. 27, &c.)—Fine, (I 1, &c.—K 1, &c.)—Garranty, (H 1, &c.—I 1, &c.)—Pleader, (S 6.)

Bar in Pleading.

Vide Abatement, (I 23.)—Accord, (D 1, 2.)—Action, (K 1, &c.—L 1, &c.)—Appeal, (G 7, &c.)—Assise, (B 13, &c.—C 4.)—Dett, (G 13.)—Pleader, (C 41. 85.—E 27, &c.—O 15.—S 11.—2 D 7, &c. 13.—2 Y 5, &c.—3 I 9.—3 K 12. 16. 20. 22, &c.—3 L 12, &c.—3 M 34.)—Voucher, (F 2.)

BARGAIN AND SALE.

(A) Of Goods and Chattels.

A BARGAIN and sale is, where a man makes a contract with another for the sale of goods or chattels, lands or tenements, and at the same time makes the sale of them.

If the contract be executory, it amounts to a covenant or agreement, upon which covenant, debt or *assumpsit* lies. *De quo, vide Agreement, (A 3, 4.)*

If the contract be executed by actual sale, this is a bargain and sale.

When a bargain and sale vests a property. *Vide in Biens, (D 3.)*

What things may be sold. *Vide in Assignment (A).—Grant (C).*

(B 1.) Of Lands and Tenements.

SO, if a man bargain and sell lands or tenements, this by the common law passes the use, which now shall be executed by the *ft.* 27 H. 8. 10. *Pl. Com. 301. b. 303. a. 2 Inst. 671.*

And a bargain and sale of land may be for years, for life, or in fee. *Pl. Com. 81. b.*

(B 2.) By what Words it shall be.

To a bargain and sale of lands, the words (*bargain and sell*) are not essential; for any words that will raise an use at the common law are sufficient: and therefore, if a man by indenture, demise, grant, set, and to farm let lands to another for years, that is a bargain and sale. *R. 8 Co. 94. a. 2 Inst. 672.*

So, if he alien and grant; or give and grant. *2 Inst. 672. Cro. El. 166.*

Or, give, grant, and confirm. *R. 3 Leo. 16.*

So, if he covenant to stand seised to the use of another in fee, and the deed be inrolled. *7 Co. 40. b. 2 Inst. 672. 1 Leo. 25.*

So, if he enfeof, sell, and grant. *Dal. 115.*

But where the intent appears to make an estate in possession, at the common law, and not by way of use, the words do not amount to a bargain and sale: as, if there be a letter of attorney in the deed to make livery, or a covenant in the deed to make livery. *R. 8 Co. 94. a. 2 Inst. 672. Cont. 3 Leo. 16. Cont. 2 Rol. 787. l. 25. Vide Covenant, (G 2.)*

So, if *A.* alien, bargain, and sell a reversion with attornment, it passes, tho' the deed be not inrolled. *R. 2 Cro. 210.*

(B 3.) How it operates.

If a man who has only a reversion, bargains, and sells an acre of land, the reversion passes. *Pl. Com. 433. b.*

So, if a corporation bargain and sell land, it is well; for they may give an use, tho' they cannot be seised to an use. *R. 2 Leo. 122.*

If the bargainor, upon his bargain and sale, reserve a rent, it is good; for the use and possession pass *tanquam uno statu.* *2 Inst. 673. li*

If a man demise, bargain and sell to *A.* for years; *A.* has an election to take by demise at the common law, or by the bargain and sale. 2 *Rol.* 787. l. 35. *R.* 2 *Co.* 35. b.

Yet if the bargainor afterwards release to *A.* and his heirs, to the use of *B.* in fee; *A.* cannot then elect to take by demise, and thereby divest the estate out of *B.* *R.* 2 *Rol.* 787. l. 45.

But by a bargain and sale nothing passes but an use; and therefore, if a man bargain and sell land, with a way over other land, the way without words of grant, being now newly created, does not pass. *R.* 2 *Cro.* 190.

So, if he bargain and sell a common, &c. newly created, and not in esse before. 2 *Cro.* 190.

If the king by indenture bargain, and sell land to another, nothing passes by the common law, nor the *st.* 27 *H.* 8. for the king cannot be seised to use, nor convey. *R.* 2 *Cro.* 50.

So, a bargain and sale of lands to *A.* and his heirs, to the use of another; nothing passes to the *cestuy que use*, for there cannot be an use upon an use. *Poph.* 81. *R.* *Bend.* 61. *Dy.* 155. pl. 20. 1 *And.* 37. *Vide in Chancery*, (4 *W* 2.)

So, a bargain and sale to *A.* for life, with power to make leases, is void, as to the power. *Poph.* 81.

If a man, at the common law, had bargained and sold his land generally, the use would be decreed to the bargainee and his heirs; for in respect of the consideration, the whole use shall be intended to pass. 1 *Co.* 87. b. 100. b.

But now, nothing passes to the bargainee, but for his life. 1 *Co.* 87. b.

If a bargain and sale by an infant be inrolled, nothing operates by the inrolment, but it shall be avoidable. 2 *Inst.* 673. *Mo.* 42.

So, a bargain and sale by husband and wife, being inrolled, does not bind the wife. 2 *Inst.* 673.

(B 4.) By what Deed.

By the common law, a bargain and sale of lands might be by *parol*, without deed. *Poph.* 48. *R.* 1 *Leo.* 18. 2 *Inst.* 675.

But now, by the *st.* 27 *H.* 8. 16. a bargain and sale of lands, &c. whereby any estate of inheritance or freehold is made, shall have no effect, unless it be by writing indented, sealed, and inrolled, &c.

Yet, after this statute, a bargain and sale of lands in *London*, &c. by custom, would be good by *parol*; for the statute does not extend to cities, boroughs, or towns corporate. *R.* *Dy.* 229. a. 2 *Inst.* 675. *Poph.* 49. *Vide London*, (N 3.) *Vide post.* (B 5.)

The indenture for a bargain and sale of lands of freehold, or inheritance, must be in writing, and not in print or stamp. 2 *Inst.* 672.

It must be in paper or parchment, and not in other materials. 2 *Inst.* 672.

And it is sufficient, if it be indented, tho' it has not the word *indenture*. *R.* 3 *Leo.* 16. 2 *Inst.* 673.

(B 5.) When it shall be inrolled.

So, by the *st.* 27 *H.* 8. 16. no manors, lands, &c. of inheritance

or freehold, shall pass, &c. unless the bargain and sale be inrolled in one of the king's courts at *Westminster*, or before the clerk of the peace, &c. in the county where the lands lie, within six months after the date of such indenture. Provided, not to extend to lands in cities, boroughs, or towns corporate, where the mayor, &c. have used to inrol deeds, &c.

And therefore, every bargain and sale for life, or in fee, must be inrolled.

So, if he in reversion bargain and sell to the lessee for years and his heirs; nothing passes as a confirmation, unless the deed be inrolled. *Dal.* 37. *Mo.* 34.

But a bargain and sale for years need not be inrolled; for the statute extends only to inheritance and freehold. *2 Inst.* 671. *2 Co.* 36. a.

Nor, a bargain and sale of lands in *London*, or any other city, borough, &c. *Vide ante*, (B 4.) *2 Inst.* 676. *Dal.* 115. *R. Rel.* 123, 4. *Vide London*, (N 3.)

So, inrolment is not necessary, where the deed does not operate as a bargain and sale, but as a covenant to stand seised, &c.

(B 6.) *How the inrolment shall be made.*] The inrolment must be in parchment only. *2 Inst.* 673.

And the deed is sufficient, being inrolled, tho' it was not acknowledged by all the parties to it. *1 Sal.* 389.

And tho' it was not acknowledged at all; for after inrolment it cannot be averred against. *1 Leo.* 184. *Vide post.* (B 10.)

Tho' the inrolment be after the death of the party. *1 Sal.* 389.

Tho' the seal be broke after the delivery. *2 Inst.* 676.

Tho' the delivery be proved by witnesses, and not acknowledged by the party. *1 Sal.* 389.

But by a roll in *B. R.*, every deed there inrolled, shall be acknowledged in open court, and inrolled on the plea side. *1 Sal.* 389.

[An indorsement on the back of the deed by the proper officer, is sufficient evidence of the inrolment. *Doug.* 57.]

(B 7.) *In what place.*] By the *st.* 27 *H.* 8. 16. the inrolment shall be in one of the king's courts at *Westminster*, or in the same county where the lands lie, before the *custos rotulorum*, two justices and the clerk of the peace, or any two of them, whereof the clerk of the peace to be one.

By the *st.* 5 *El.* 26. the inrolment in the counties of *Lancaster*, *Cheshire*, and *Durham*, shall be in the *Chancery* or *Exchequer*, or before the justices of assize of the respective county.

If the court of *B. R.*, &c. be adjourned to another place, yet the inrolment may be there, as well as at *Westminster*. *2 Inst.* 674.

So, an inrolment may be before the justices and clerk of the peace of the West Riding in the county of *York*, if the land lies there. *R. Hob.* 128.

Otherwise if the land be alleged in *comitatu Ebor*, generally. *Hob.* 128.

(B 8.) *Within what time.*] The inrolment shall be within six months after the date of the deed.

And

And the computation shall be by lunar not by calendar months.

2 *Inst.* 674.

If it be within six months, exclusive of the day of the date, it is sufficient. 2 *Inst.* 674. *Mo.* 40. 2 *Rol.* 520. *l.* 45. *Hob.* 139. *Dy.* 218. *b.* *R.* *Dal.* 41.

Or, upon the day of the date. *Semb.* 2 *Inst.* 674. *Dal.* 42. *Mo.* 42. *D.* *Hob.* 140. 1 *Rol.* 387.

And if there be no date within six months after the delivery. 2 *Inst.* 674. *D.* *Hob.* 140. 5 *Co.* 1. *b.*

But if it be dated, it ought to be within six months after the date, tho' the delivery be afterwards. 2 *Inst.* 674. *Per two J. Weston cont.* *Dal.* 42. *Mo.* 42.

(B 9.) *How it shall relate.*] If a bargain and sale be inrolled within six months, it relates to the time of the date, and passes *ab initio.* 2 *Inst.* 674.

And therefore, if the bargainor, or bargainee, die after the indenture executed, and before inrolment, the estate passes to the bargainee and his heirs, if it be inrolled within six months. 2 *Inst.* 674, 5. And the heir shall be in ward. *R.* *Hob.* 136. *Ow.* 149. 2 *Cro.* 408. *R.* 1 *Rol.* 627. *l.* 35.

So, if a *precipue* be brought against the bargainee, and a recovery upon it before inrolment, it is good; for he was tenant of the freehold. 2 *Inst.* 675. *Ow.* 70.

So, if the bargainee fell before inrolment, and the deed be afterwards inrolled within six months, his sale is good. 2 *Inst.* 675. *R. cont.* *Hob.* 136. *Vide Hob.* 165. *R. acc.* 4 *Leo.* 4. *Per three J. two cont.* 2 *Cro.* 52.

Or, if the bargainor, before inrolment, acknowledge a recognizance, &c. the bargainee shall avoid it. *R.* 2 *Inst.* 674.

Or, give a judgment, &c. *R.* *Cro. Car.* 217.

So, if the bargainor afterwards bargains and sells to another, and the second deed is first inrolled, and then the first bargain is inrolled within six months, the second shall be void. *R.* *Dal.* 41. *Mo.* 41. *Dy.* 218. *b.* *Per Hob.* 165.

So, if the bargainor die before inrolment, his wife shall not enjoy her dower after the inrolment, if it be within six months. *Cro. Car.* 569.

But if the bargainee die before inrolment, and the deed be afterwards inrolled, his wife shall be endowed. *R.* *Cro. Car.* 217. *Cont.* *Ow.* 70. 150.

If the bargainee grant a rent before inrolment, it will be good. *Cro. Car.* 217.

So, if a stranger release to the bargainee before inrolment, it is good. 2 *Inst.* 675.

If there be a bargain and sale of a manor, with an advowson appendant, and the advowson fall before inrolment, the bargainee, if the deed be afterwards inrolled, shall present. *Cro. Car.* 217. *Vide* 2 *Bul.* 8, 9.

If a joint-tenant make a bargain and sale, and before inrolment his companion dies, yet only one moiety passes; for it has relation to the time of the deed. *Co. Litt.* 186. *a.* *Cro. Car.* 217. 569.

Tho' the bargain and sale has words, which comprehend the whole. *Ow.* 70.

So, if the bargainee makes a lease, and afterwards the deed be inrolled, the lease will be good. *R. cont. Cro. Car.* 110. *R. cont. Carth.* 178.

So, if there be a bargain and sale of a reversion, the bargainee shall have the rent-charge incurred, in the mean time, between the deed and the inrolment. *R. Latch*, 157. *Adm.* 1 *Sid.* 310. *Cro. Car.* 218.

And by the bargain and sale the rent accrues, without attornment. *R. Cro. El.* 166. *Vau.* 51.

But if the rent incurred before the inrolment be paid to the bargainor, the bargainee has no remedy. *Dy.* 218. *b. in marg. Ow.* 69. 150.

So, in the mean time, between the bargain and sale, and the inrolment, the bargainee shall be adjudged to be seised, if the deed be afterwards inrolled within the six months and not the bargainor. *R. Ow.* 70. 150. *Dub. Cro. Car.* 218. *Vide Dan.* 696.

But after the bargain and sale, and before inrolment, if the bargainor levies a fine to the bargainee, and then the deed be inrolled, the bargainee takes by the fine. *R. Mo.* 337, 8. 680. *Cro. El.* 917. *R.* 4 *Co.* 71. 2 *Inst.* 671, 2. 1 *And.* 285.

And it may be averred, that the fine was before inrolment, or *e contra.* *R.* 1 *And.* 285, 6.

So, if the bargainor in the mean time, between the date and inrolment, enfeoff the bargainee, he takes by the feoffment. *R. Yel.* 124. *R.* 1 *Leo.* 6. *Semb. Ca. Ch.* 115. *R.* 1 *And.* 113.

Otherwise, where an inrolment is not necessary, *de quo vide ante*, (B 4, 5.) for then the bargain and sale is complete before the fine or feoffment. *R. Yel.* 124.

So, if the lord of a manor bargain, sell, enfeoff, and release to his copyholder, to the use of him and another, and afterwards makes livery, he takes by the feoffment, tho' the release might operate presently. 2 *Roll.* 787. l. 20.

So, if a man lease for years part of the manor, and afterwards bargains and sells, demises, and grants the whole to *B.* for years; if *B.* takes attornment of any of the tenants, he shall take by the grant; for he has an election to take by the one or the other, and when he takes attornment he elects by the grant, and therefore shall take the whole by the grant. *R.* 2 *And.* 203. 2 *Co.* 35.

So, after a bargain and sale, if the deed be never inrolled, the bargainor continues seised.

And if before the six months after the first deed, there is a second bargain and sale, which is well inrolled, it will be good. *Cro. Car.* 284.

(B 10.) *There shall be no averment after an inrolment, contrary to the purport of the deed.*] If the deed be inrolled, it cannot be averred, that it was *primo deliberat.* at a day since the date; for by the same reason it might be averred, that it was never delivered. *R.* 1 *Leo.* 183. 2 *Leo.* 122. *Ow.* 138.

And it cannot be averred, that it was not delivered. 1 *Leo.* 183.

Or,

Or, that it was not acknowledged. 1 *Leo.* 184. *Vide ante*, (B 6.)

So, since 16 *Eliz.* it cannot be averred, that it was not inrolled at the day indorsed for the inrolment; for that is part of the record. *Semb.* 2 *Rol.* 119, 120.

But before, no day of inrolment used to be entred, and then it might be averred, that it was not inrolled within six months. *R.* 2 *Rol.* 119.

But there may be an averment contrary to the operation of the deed: as, that it was not comprised within the deed. 1 *Leo.* 184, 185.

That nothing passed by the deed. 1 *Leo.* 184, 185.

So, an infant or *feme-covert*, is not included by an inrolment. *Vide ante*, (B 3.)

So, a stranger is not concluded by an inrolment, but may aver that the deed was delivered after the date. *R. Sav.* 91. *Per Holt C. J. at Maidstone.*

(B 11.) What shall be a sufficient Consideration.

A bargain and sale of land, whereby an use arises, ought to be made upon a valuable consideration. *Vide Covenant*, (G 3, &c.)

As, for money paid. [2 *Atk.* 148.]

So, it is sufficient, if it be under a condition or proviso to be void, if money is not paid, tho' no money is mentioned to be paid. 1 *Leo.* 6.

Or, if the vendee by the same deed covenants, if the money is not paid, &c. to be seized to the use of the vendor. 1 *Leo.* 25.

So, in consideration of money paid for other land. *R. Mo.* 547, 8.

So, for the loan of 100 *l. per annum.* 2 *Rol.* 782. *l.* 30.

So, if upon a bargain and sale a rent be reserved, it is sufficient, without other consideration. 2 *Rol.* 788. *l.* 7. 1 *Mod.* 263.

So, a pepper-corn reserved. *Semb.* 1 *Mod.* 263. *R.* 2 *Mod.* 253. 2 *Vent.* 35.

So, money paid by any one of a corporation in his private capacity, is sufficient for a bargain and sale to them in their corporate capacity. *R.* 2 *Rol.* 788. *l.* 5.

But a bargain and sale, for *divers causes and considerations*, without money, is not good. 1 *Leo.* 170. *R. Cro. El.* 394. 1 *Co.* 176. *a. Vide Covenant*, (G 4.)

Tho' it be recited by the indenture, that the bargainee was bound by recognizance or obligation for the bargainor; if no money appears to be paid. *R. Cro. El.* 394. 2 *Rol.* 783. *l.* 40.

So, if a man bargain and sell land, in consideration of a marriage before had, or service done, it is not sufficient. *Semb. Dal.* 18.

Or, in consideration of natural affection to his son. *R.* 2 *Cro.* 127. [2 *Atk.* 148.]

Yet if money was given, it may be averred, tho' it be not expressed by the deed. 1 *Leo.* 170. *Mo.* 570.

Tho' there be no mention in the deed of any consideration in particular, or in general terms. 2 *Rol.* 790. *l.* 15.

And if the bargain and sale be mentioned by the deed to be for money

money paid, it is sufficient, tho' none was paid; for the payment is not traversable. 1 *Leo.* 170. *Mo.* 570.

And *pro quadam pecuniæ summa*, is sufficient, without ascertaining the quantum. 1 *Leo.* 170. *Mo.* 570. 2 *Rol.* 786. l. 45.

So, a bargain and sale pleaded, without expressing that it was for any consideration, is well. *R.* 1 *Leo.* 170. but *Mo.* 570. *Semb. cont. R. acc. Mo.* 504.

[So, when the consideration expressed in the deed was 28 *l.* parol, evidence was admitted to prove that 30 *l.* was the real consideration. *Rex v. Scammonden, M.* 30 *Geo.* 3. 3 *T. R.* 474.]

[Other considerations may be proved than those expressed. *Ibid. Filmer v. Gott, 7 Bro. P. C.* 70.]

Vide more, post. (B 12.)

(B 12.) How a Bargain and Sale shall be pleaded.

If a bargain and sale be pleaded, the most regular form is, that such an one by indenture, of such a date, between such and such, *debito modo* in such a court, *infra 6 menses tunc proximos sequentes irrotulat. secundum formam statuti*, &c. *pro quadam pecuniæ summa bargainizavit & vendidit*, &c. 2 *Sand.* 11, 12.

If the deed be by the words, *dedi & concessi*, &c. yet if it operates as a bargain and sale, it ought to be so pleaded. *R. Cro. El.* 166. *Vide Pleader*, (C 37.)

If a bargain and sale be pleaded, without alleging in what court it was inrolled, it will be bad. *R. Yel.* 213. And *juxta formam statuti* does not supply it. 2 *Cro.* 291.

So, if it be said *debito modo irrotulat. in such a court*, without saying, *secundum formam statuti*, or *within six months*, it will be bad. *R.* after verdict. *All.* 19. *Semb. Cart.* 221.

But if *secundum formam statuti*, be added without saying *within six months*, it is sufficient. *Semb.* 2 *Sand.* 11.

So, if it be said *debito modo irrotulat. in such a court within six months*, it is good, altho' *secundum formam statuti* be omitted. *Semb.* 2 *Sand.* 12.

So, if it be said that such an one by indenture *bargainizavit & vendidit*, it is good, tho' *pro quadam pecuniæ summa* be omitted. *Dub. Dy.* 90. b. But it was *R. acc. ibidem in marg. Semb. cont. Mo.* 570. But it was *R. acc. Mo.* 504. 1 *Leo.* 170. *Dub. Ray.* 201. 1 *Lev.* 308.

But if it should be bad upon demurrer, it will be good after verdict. *R.* 1 *Lev.* 308. *R.* 1 *Vent.* 109.

[If any money or valuable consideration is not shewn, or if issue is taken on a collateral fact, it will be bad on demurrer; but it is good after verdict. *Sargent v. Reed, P.* 18 *G.* 2. *Str.* 1228. *Wilf.* 91.]

If there be a bargain and sale of a rent, the party ought to plead attornment, and *virtute cujus* he was seised, does not supply it. *R.* upon demurrer. *Cart.* 221.

If a bargain and sale be pleaded, it ought to conclude, that by virtue thereof, and of the inrolment, and the statute of uses, he was seised, &c. 2 *Sand.* 12.

If a tenant for life, who has a power by devise to make sale, sells,

sells, the vendee may conclude thus, tho' his estate only passed by the statute. *Per Jones, two J. cont. Jon. 328.*

So, he ought to conclude *quod intravit*; for *that by the statute of uses he was seised*, without entry, is not sufficient. *R. Noy, 6.*

B A R O N.

Baron of the Realm.

Vide Dignity, (B 6.)

Barons of the Exchequer.

Vide Courts, (D 10.)

Court-Baron.

Vide Copyhold, (R 1, &c.)

BARON AND FEME.

(A) Feme-Sole.

(A 1.) What Acts she shall do.

A *Feme-sole*, before her marriage, may do all acts for disposition, &c. of her lands or goods, which any man in the same circumstances may do.

But the law does not require any thing indecent of her: and therefore, if she does homage, she shall not say, *I become your woman*, but, *I do homage unto you*, &c. *Co. Litt. 66. a. Lit. f. 87.*

(A 2.) What, a Feme-Sole Merchant.

So, by the custom of *London*, a *feme-covert* may act as *sole* in the way of trade, if she buys and sells in trade for herself, with which her husband does not intermeddle. *Cro. Car. 69. Vide London, (N 7.)*

And in such case, if there be a suit against her, the husband shall be joined only for conformity; for the wife only shall be in execution. *Cro. Car. 69.*

So, it shall be if the husband formerly used the same trade, but at the time of the contract is a soldier beyond sea, and does not intermeddle. *Per three J. Cro. Car. 69.*

But every *feme-sole* who trades within *London*, is not a *feme-sole* merchant. *Cro. Car. 69.*

(A 3.) What, if the Husband be in Exile.

So, if the husband be banished for life, his wife may make a testament, and in all cases act as a *feme-sole*. *R. 2 Ver. 104, 5. Vide in Abatement, (E 6.—F 2.)*

[And where credit has been given to the wife of a man in exile, she alone is liable. 1 *Term Rep.* 8.]

[So, where the husband has abjured the realm. *Id. ibid.*]

[So, where he is transported. *Id.* 9.]

[So, where he resides abroad. *De Gaillon v. L'Aigle*, C. P. M. 39 Geo. 3. 1 *Bos. & Pull.* 357.]

[It seems that a woman living apart from her husband in a state of adultery, is liable on her own contracts, tho' she have no separate maintenance. *Cox v. Kitchin*, C. P. M. 39 Geo. 3. 1 *Bos. & Pull.* 338.]

(B) Marriage.

(B 1.) What shall be.

UT conjugium subsistat non aliud natura requirere videtur, quam ut talis sit cohabitatio quæ fæminam constituat quasi sub oculis. & custodiâ maris; ad hoc in homine accedit fides quâ se fæmina mari obstringit. *Grot. de Jure Belli & Pacis*, l. 2. c. 5. f. 8, 9.

Nec lex divina amplius exegisse videtur ante Evangelii propagationem. *Grot. ibid.* f. 9.

Apud veteres Romanos triplex erat contrahendi matrimonii formula, confarreatio, coemptio, et usus. *Seld. Ux. Heb.* l. 2. c. 1.

Sic apud Hebræos; nummuli datio, pactionis libellus, et coitus. *Seld. Ux. Heb.* l. 2. c. 1.

Ut fæmina foret verè uxor, ante legem Mosaicam, et sine eâ, præter mutuum in vitâ lætisque societatem consensum, concubitus erat necessarius. *Seld. de Jure N. et G.* l. 5. c. 4.

Sed lege Mosaicâ per sponsalia fuit verè uxor, per nuptias perfectè. *Seld. ibid.* c. 4. *Ux. Heb.* l. 2. c. 1. 13.

Sic jure Casareo et plerumque pontificio sponsalia sunt matrimonii ipse contractus, et stipulatio, et nuptiarum futurarum repromissio. *Seld. Ux. l. 2. c. 1. Mo.* 170.

So, by the common law. *Co. Lit.* 34. a. If it be a contract per verba de præsentii. *Dy.* 369. a. *R.* 6 Mod. 155. *Sal.* 437. *Carth.* 99.

So, if a contract per verba de futuro be afterwards executed by consummation. *Semb. Sal.* 438.

Sed interdum jure pontificio sponsalia tantum obligant ad futuri matrimonii pactionem, consensu nondum satis firmati. *Seld. Ux. l. 2. c. 1.*

Et jure Casareo, ac Hebræo, æquè ac pontificio, nuptiæ sunt solennes illi ritus quibus matrimonium perficitur. *Seld. Ux. l. 2. c. 1. 13.*

So, by the common law, till the marriage be solemnized, the wife cannot be endowed ad ostium ecclesiæ. *Co. Lit.* 34. a.

And the usual pleading of a marriage is, per presbiterum sacris ordinibus constitutum. *Sal.* 120

By an order of parliament 1653. 6. confirmed by the st. 12 Car. 2. 33. marriage shall be before a justice of peace, and declared by him.

Yet, during this order, a marriage by a person infra sacros ordines, was good. 1 *Sid.* 64.

By the st. 1 W. & M. 18. no person taking the oaths, &c. shall be prosecuted in the ecclesiastical court for non-conforming to the church of England.

And if such marriage, in the face of a separate congregation, be questioned in the spiritual court, a prohibition goes. 3 *Lev.* 376. *So,*

So, a marriage by a popish priest by the *Latin* service, in a chamber, was allowed, and a second marriage annulled by a sentence in the ecclesiastical court, and the person for such second marriage convicted of felony. 4 vol. of *Trials*, 745. 763.

Yet after contract, *si coeunt*, they are not suable for fornication, but only for a contempt of the church. *Mo.* 170. *Sal.* 438.

And if subsequent espousals ensue, they have relation to the first contract, and avoid all mesne acts. *Mo.* 170.

But if a man sick in his bed be married to a woman with child, privately out of a church and chapel, without celebration of mass, it was not a marriage. *Semb.* 1 *Rol.* 359. *l.* 15.

So, by a contract of marriage, it is no marriage, if espousals do not afterwards ensue. *Semb.* *Mo.* 170.

So, if the marriage be not conformable to the ecclesiastical law, the husband shall have no right by the ecclesiastical law: as, if the marriage be in a separate congregation by their preacher, who is a lay-man, the husband will not be entitled to administration. *R.* 1 *Sal.* 120.

Yet, where there is a marriage in fact only, the wife, or her children, who were not in fault, may be entitled to a temporal right. *Adm.* *Sal.* 120.

So, if there be a marriage *de facto*, the husband and wife may sue for a debt due to the wife. *Sal.* 437.

[On action for criminal conversation, there must be evidence of a marriage *in fact*. Acknowledgment, cohabitation, and reputation, not sufficient. *Morris v. Miller*, *P.* 7 *G.* 3. 4 *B. M.* 2057. 1 *Bl.* 632.]

[An actual marriage may be proved by a copy of the register, and the minister, clerk, or subscribing witnesses to the register, are not the only competent witnesses, to prove the identity of the persons married. *Birt v. Barlow*, *B. R. E.* 19 *G.* 3. *Doughl.* 171.]

[By *st.* 26 *G.* 2. *c.* 33. banns shall be published in the churches of parishes where parties dwell, and the marriage solemnized in one of them. Minister not obliged to publish without seven days notice. Minister not punishable for marrying infants after banns, unless parents, &c. declare their dissent, then banns void. Licence shall be granted only for church where has been the usual place of abode of one party for four weeks immediately before. (Special licences excepted.)]

[If any person solemnize marriage in any place but a church where banns are usually published, (except by special licence,) or without banns or licence, he is guilty of felony, and shall be transported for fourteen years; and the marriage is void to all intents.]

[But after solemnization of marriage by banns or licence, it shall not be necessary in support of it, to give any proof of the actual dwelling of the parties in the parishes where banns published, or usual place of abode where marriage solemnized by licence; nor shall evidence be received to prove the contrary in any suit touching the validity of such marriage. *Nota; This may in a great measure defeat the most salutary purpose of this well-meant law.*]

[Marriage (by licence) of a minor, (not widower nor widow,) without consent of father, or guardian lawfully appointed, or mother, (unmarried,) or guardian appointed by Chancery, void to all intents.]

[Guardian or mother, *non compos*, beyond sea, or refusing consent; person desirous of marrying may petition lord chancellor, who may summarily proceed, and declare the marriage proper, and that shall be as effectual as their consent.]

[This act extends to bastards, and a marriage of them within age, without banns, and without consent of father, &c. is void. 1 *Term Rep.* 96.]

[There shall be no suit in the ecclesiastical court to compel marriage, on a contract, in words present or future.]

[Register-books to be provided, and banns and marriages entred and signed. Making false entry, altering entry, forging or altering licence, uttering such entry or licence, with intent to elude this act, or destroying any part of register to avoid a marriage, or subject any one to penalties, is felony, without clergy.]

[This act extends not to royal family, *Scotland*, beyond seas, Quakers, nor Jews.]

[A marriage against the statute is not only *voidable*, but *void* to all intents. *Rex v. Preston*, *M.* 33 *G.* 2. *B. S. C.* 154.]

[It is not incumbent on the persons married to *prove* that the banns were published. Nor does the entry (of the banns and marriage *semb.*) directed to be made, affect the validity of the marriage. *St. Rex v. Devereux*, *P.* 2 *G.* 3. *B. S. C.* No. 162.]

[By *st.* 12 *G.* 3. *c.* 11. descendants of *Geo.* 2. except the issue of princesses married into foreign families, cannot marry without the king's consent under the great seal, declared in council.]

[But if such descendants, aged twenty-five, give notice to privy council of their intention to marry; they marry after twelve calendar months, unless both houses of parliament declare their disapprobation.]

(B 2.) Who may marry.

By the *st.* 32 *H.* 8. 38. no prohibition, God's law except, shall impeach any marriage without the Levitical degrees; and none shall be admitted in the spiritual court to any process, plea or allegation, contrary to this act.

And therefore, if an idiot, *a nativitate* marry, the marriage is good, and the issue legitimate. *R.* 1 *Rol.* 340. *l.* 32. *D.* 1 *Sid.* 112.

So now, since the *stat.* 2 *Ed.* 6. 21. and 5 *Ed.* 6. 12. all ecclesiastical persons may marry. *Vide* 2 *Inst.* 686.

And tho' the *st.* 2 & 5 *Ed.* 6. were repealed by the *st.* 1 *Mar.* 2. yet that being repealed by the *st.* 1 *Jac.* 25. the *st.* 2 & 5 *Ed.* 6. are revived; and the marriage of ecclesiastical persons is valid, and their issue legitimate. *R.* 12 *Co.* 9. 2 *Inst.* 686, 7.

(B 3.) Who not.

But none can marry any one who is married to another then alive, *Vide post.* (B 6.)

Tho' the first husband or wife enter into religion. 1 *Rol.* 340. *l.* 25. 30.

Or, they are divorced *a mensa* & *thoro* only. *Co. L.* 235. *a.* *Vide post.* (C 5.)

So, no one, pre-contracted to any, ought to marry another; for the contract

*Not Law
now*

contract makes the marriage, if espousals afterwards ensue; for they have relation to the first contract, and avoid all mesne acts. *Mo.* 170. *Vide post.* (C 1.)

(B 4.) *What shall be within the Levitical degrees.*] So, since the *st.* 32 *H.* 8. 38. a marriage within the Levitical degrees shall be disallowed; and therefore, a marriage with a next of kin, being prohibited by the xviii. and xx. of Leviticus, none can marry his or her father, mother, brother, sister, son, or daughter. 2 *Inst.* 693. *R.* *Vau.* 306, 7. *Eq. Ca.* 157.

So, none can marry any next of kin to them by affinity, any more than if they were of kin by consanguinity: and therefore, if one marry the mother, sister, or daughter of his wife, it will be within the Levitical degrees. *Levit.* xviii. v. 17, 18. *Vau.* 310.

And tho' the sister of his wife is prohibited, *Levit.* xviii. 18, 19. only during his wife's life, yet it is now unlawful after the death of his wife; for it is within the Levitical degrees. *R.* *Vau.* 320. 312. 324. 328. and is so declared by the 18 *Can. Apost.* by the *st.* 28 *H.* 8. 7. and by the parochial table. *R.* *Skin.* 37.

So, a father, brother, or son of the husband is unlawful for the wife; for by the interdict to the man, the same degree is prohibited to the woman. 2 *Inst.* 683. *Vau.* 305.

So, all marriages mentioned in the *st.* 28 *H.* 8. 7. and all mentioned in the parochial table, which by the 99th Canon made *anno* 1603, and duly confirmed, are declared contrary to the law of God, are therefore now unlawful. *Vau.* 215. 323. 325. 327, 328.

So, a marriage with a next of kin to his next of kin by affinity, or consanguinity, are within the Levitical degrees, and disallowed by the *st.* 28 *H.* 8. 7. and 32 *H.* 8. 38.

And therefore, it appears by *Levit.* xviii. and xxi. by these statutes, and the parochial table, which enumerates 30 unlawful marriages within the Levitical degrees, that none can marry his grandmother, aunt, or granddaughter on the part of his father, or on the part of his mother. *Vau.* 308, 9. *Eq. Ca.* 158.

So, a woman cannot marry her grandfather, uncle, or grandson.

So, a man cannot marry the grandmother, aunt, or granddaughter of his own wife. *Vau.* 311. *R.* *Eq. Ca.* 156.

[A man may not marry his wife's mother's sister. *R. per tot. cur.* on solemn argument, on declaration in prohibition, and consultation awarded. *Butler v. Gastrel*, *H.* 1723, *Bunb.* 145.]

Nor, a wife those relations of her husband.

So, an uncle cannot marry the daughter of his brother or sister, tho' not expressly mentioned. *Levit.* xviii. or xx. for it is in the same degree, viz. next of kin to his next of kin. 2 *Inst.* 683. *Vau.* 323. *R.* *Skin.* 37.

So, he cannot marry the daughter of his wife's brother, or sister; for he is uncle to such by affinity. *R.* *Cro. El.* 228. *Mo.* 907. 4 *Leo.* 16. *Mann.* *R.* *Hob.* 181. *R.* *Vau.* 248. *Pearson.* *Acc.* *Vau.* 323. *Semb.* 3 *Lev.* 364. *R.* 2 *Lev.* 254. 2 *Jon.* 118. *R.* *Ray.* 464. *R.* *Lut.* 1077. *D.* 2 *Inst.* 683. *Semb.* 5 *Mod.* 448. *Semb.* 1 *Sid.* 434. *R.* in *Exchequer*, 8 *Geo.* inter *Butler* and *Gastril*, *Eq. Ca.* 157, 158. *Vide Noy.* 29.

Nor, the daughter, being the bastard, of his sister; for the Levitical

cal law says, *non accedas ad proximam sanguinis tui.* *Semb. 5 Mod.* 168. *Comb.* 356.

Nor the daughter of his mother's sister.

So, a marriage to the grandfather, great-grandfather, and great-great-grandfather, and so interminately in a direct line ascending, or descending, is unlawful; for it has the same repugnancy, as a marriage in the first lineal degree. *Vau.* 242.

But by the *st.* 22 *H.* 8. 38. no prohibition, God's law except, (which exception extends to cases of pre-contract, impotence, former marriage, &c. which otherwise would be allowed by this act. 2 *Inst.* 687. *Vau.* 220, 221.) shall impeach any marriage without the Levitical degrees; and none shall be admitted to any process, &c. in the spiritual court contrary to this act.

No law has expressly determined what marriages are without the Levitical degrees, but *Levit.* xviii. 6. says, *Thou shalt not uncover the nakedness of thy near of kin: and Levit.* xxi. 2. names, father, mother, brother, sister, son, and daughter, as near of kin: and *Levit.* xviii. illustrates this general rule, by a prohibition to discover the nakedness of the father and mother, v. 7. of brother, sister, v. 9. 16. of son, v. 15. in which the daughter is included, tho' not named. And *Levit.* xviii. v. 12, 13, 14. prohibits to uncover the nakedness of the father or mother's brother, or sister, and of the son's daughter, v. 10. because near of kin to father, &c. And of the wife's daughter or sister, v. 17, 18. because her near of kin; and by parity all near of kin to the near of kin by affinity, or consanguinity, and beyond these degrees, *Levit.* xviii. or xx. the *st.* 28 *H.* 8. 7. or the parochial table do not extend; and therefore all marriages out of these degrees seem now lawful in the collateral line, *Vau.* 307.

And therefore, a marriage with the relict of his grand-uncle, the wife of his grandfather's brother, tho' not allowed by the canon or civil law, shall not now be impeached. *R.* by all the Judges of *England.* *Vau.* 241. 250. 2 *Vent.* 16.

Nor, the marriage of a son by a former *venter*, with the daughter of his father's wife by her first husband; tho' the *karaites* made a rule which prohibits any two near of kin to marry two other near of kin. 2 *Inst.* 684. *Vau.* 318.

Nor, a marriage between cousin-germans; for it is allowed by the *st.* 32 *H.* 8. 38. *Vau.* 218. 2 *Inst.* 684. *Eq. Ca.* 159.

Or, with a woman, who was godmother to his cousin at baptism, or confirmation. 2 *Inst.* 684.

And if the spiritual court impeach a marriage without the Levitical degrees, a prohibition lies. *Cro. El.* 228. *Vau.* 207—220. 304. *Vent.* 10—15. 21. *Eq. Ca.* 156.

(B 5.) At what Age.

By the law of *Scotland*, a woman cannot *contrahere sponsalia*, before her age of seven years. 1 *Rol.* 342. l. 20.

But by the common law, persons may marry at any age. *Co. Lit.* 33. a.

And upon such marriage the wife shall be endowed, if she attain the age of nine years, of whatsoever age her husband be; but not before the age of nine years. *Co. L.* 33. a.

And, if the husband alien his land, and afterwards his wife attain the

the age of nine years, she shall be endowed of the land sold before,
Co. L. 33. a

And, if there be a writ to the bishop to certify, whether they were ever coupled in lawful matrimony, he ought to certify that they were, of what age soever the husband be. *Co. L. 33. a. R. Dy. 362. a.*

And at any age the husband shall have trespass *de muliere abducta cum bonis viri.* *1 Rol. 341. l. 35.*

And if the husband die before age of consent, the marriage is dissolved, but not disaffirmed *ab initio.* *Semb. cont. Mo. 741.*

Yet to such marriage the husband or the wife may agree, or disagree, at his or her age of consent.

By the law of *Scotland*, and the civil as well as the common law, the age of consent of the man is the age of 14 years. *1 Rol. 342. C.*

The age of the woman, by the civil and common law, is the age of 12 years. *1 Rol. 342. l. 15. 17.*

By the law of *Scotland*, it is the age of 14 years. *1 Rol. 342. l. 18.*

If at the time of the marriage, the husband be above 14, and the wife under 12, when she attains the age of 12 years, the husband may disagree as well as the wife, and so *vice versa.* *Co. L. 79.*

A disagreement to the marriage, before the age of consent, is of no force. *Vide 1 Rol. 340. l. 50.*

For, if the husband disagree before 14, and marry another, the issue of the second marriage is a bastard. *1 Rol. 341. l. 45. Cont. Dy. 13. a. in marg.*

But a disagreement before, if the husband marries another after the age of 14, amounts to a disagreement after the age of consent. *1 Rol. 341. l. 15. R. Mo. 575.*

If the husband, or wife, at the age of consent, once agree to the marriage, they cannot afterwards disagree.

And a continuance of the suit in trespass, *de muliere abducta cum bonis viri*, after that age, amounts to an agreement. *1 Rol. 341. l. 35.*

And if after the age of consent, the husband, or wife, disagree by parol, yet cohabit as husband and wife, this amounts to an agreement. *R. 1 Rol. 341. l. 25.*

Tho' the words of disagreement are reduced into writing, and signed by the husband. *1 Rol. 341. l. 25.*

Otherwise, if the disagreement be made before the ordinary. *Per Warberton, 1 Rol. 341. l. 32.*

(B 6.) Who are Husband and Wife.

If a man and a woman marry under the age of consent, they are husband and wife till disagreement. *Vide ante, (B 5.) 1 Leo. 53. 4.*

So, if a man marry a woman pre-contracted, they are husband and wife, till divorced.

So, if he marry within the Levitical degrees. *1 Rol. 340. l. 10. 17. 357. l. 45.*

So, if a priest had married before the *fl. 32 H. 8. 38. 1. Rol. 340. l. 35. 40. 2 Inst. 687. Dy. 185. a. in marg.*

So, if there be a marriage by duress. *Per Yaxly, Frowick cont. Kel.*

Kel. 52. b. *Cont. per Windham*, 1 *Sid.* 65. *D. cont.* 1 *Rol.* 340. l. 20. *R. acc. Cro. Car.* 488. 493. *Per Noy, Dy.* 13. a. in marg. So, if they are divorced only à mensâ & thoro. 1 *Rol.* 341. l. 40. *Co. L.* 235. a. *Vide post.* (C 5.)

But a marriage, when a former husband or wife is alive, is null, as well by the spiritual as by the common law, and they are not husband and wife *de facto*. 1 *Rol.* 340. l. 13. *R. Cro. El.* 857, 8. 1 *Rol.* 3. 4057. l. 360. *F.* 1 *Sal.* 121.

So, if a nun had married; for she was under a vow of chastity; and therefore her marriage was void. *Cont.* 1 *Rol.* 340. l. 41. *Acc.* 2 *Inst.* 687. 12 *Co.* 9.

Or, a monk. 12 *Co.* 9. 2 *Inst.* 687.

[If a woman marry a second husband, living the first, and the second not privy, she is during the cohabitation to be considered as a servant to him, and he is entitled to the benefit of her labour. *Strutville v. —*, *Hil.* 4 *G. Str.* 80.]

(C) Divorce.

(C 1.) *A Vinculo Matrimonii.*

(C 1.) *Causa præ-contractus.* A Divorce is à vinculo matrimonii, or, à mensâ & thoro. *Co. L.* 235. a.

A divorce will à vinculo when the husband, or wife, was præ-contracted to another. *Co. L.* 235. a. *Vide ante*; (B 3.)

And a divorce for præ-contract may be made, without summoning any to answer in the spiritual court, except the parties to the præ-contract: as, if *A.* be contracted to *B.*, and afterwards marry *C.*, the divorce may be by libel by *B.* against *A.*, without process against *C.* *Mo.* 170.

So, a divorce is well made by a sentence, that *A.* do marry *B.*, without a sentence to declare the marriage void between *A.* and *C.* *R. Mo.* 170.

But by the *st.* 32 *H.* 8. 38. all marriages in *England*, solemnized in the face of the church, and consummated, &c. shall be valid, notwithstanding any præ-contract of both or either party not consummated.—But this clause was repealed by the *st.* 2 & 3 *Ed.* 6. 23. and not revived by the *st.* 1 *El.* 1.

So, by the *st.* 33 *H.* 8. 6. in *Ireland*. But it being repealed in *Ireland* by the *st.* 3 & 4 *Ph. & M.* nothing was revived by the *st.* 2 *El.* 1. there, except what concerns the degrees of consanguinity.

So, if a marriage be dissolved by a sentence upon a præ-contract, the man and former wife are not complete husband and wife till the marriage be solemnized. *Cont. per Noy*, but *Twissd. acc.* 1 *Sid.* 13.

[By 26 *G.* 2. c. 33. *f.* 13. no suit or proceeding shall be had in any ecclesiastical court, in order to compel a celebration of any marriage in *facie ecclesiæ*, by reason of any contract of matrimony, whether *per verba de presenti*, or *per verba de futuro*, which shall be entred into after the 25th day of *March* 1754.]

(C 2.) *Consanguinitatis aut affinitatis.* So, a divorce *causa consanguinitatis aut affinitatis*, is à vinculo. *Co. L.* 235. a. 47 *Ed.* 3. pl. 78.

Tho' it were for spiritual affinity, when that was allowed.

By the law of the *Hebrews*, there was no divorce for incest; for the marriage was null. *Vau. 313.*

(C 3.) *Impotentia.*] So, a divorce, *causâ impotentia*, will be à *vinculo*. *Co. L. 236. a. 1 And. 185. 5 Co. 98. b. 2 Leo. 170. Dy. 187. b. 179. a.*

A divorce for impotence or frigidity, may be upon an universal impotence; as, if he be an eunuch.

Or, for a perpetual impotence previous to the marriage *quoad hanc*, be it natural or accidental. *R. 11 Jac. Earl of Essex, 2 Leo. 172, 3.*

If there be a divorce upon evidence, which shews a perpetual impotence *quoad hanc*, and the husband afterwards marries, and has issue by another wife, the issue shall be legitimate; for the first sentence shall be in force till repealed, and the second marriage good, unless it be dissolved in the life of the parties, and a man may be *habilis et inhabilis diversis temporibus*. *R. 5 Co. 98. b. 2 Leo. 169. 173. Dy. 179. a.*

So, if the woman afterwards marry, and she and her second husband levy a fine, and then the former husband by a second wife has issue, the fine shall not be stayed. *Dy. 179. a. 2 Leo. 169.*

So, if the husband bring trespass *pro uxore abductâ cum bonis viri*, and, pending the action, the husband and wife are divorced *causâ impotentia*; the action does not abate; for it is founded upon the possession, and *ne unques accouple* is no plea. *2 Leo. 170.*

(C 4.) *Metus.*] So, a divorce, *propter metum*. *Co. L. 235. a.*

Or, *propter sevitiâ*.

A divorce for severity is grounded upon the law of nature. *Cro. Car. 463.*

And it will be a cause for it, if the husband strip his wife of her apparel, and other necessities. *1 Sid. 118.*

But a divorce for severity, is not a divorce à *vinculo*, but a separation à *mensâ & thoro* only. *Cro. Car. 462.*

And a subsequent marriage, after such divorce, is not lawful. *Cro. Car. 463.*

(C 5.) *A Mensâ & Thoro.*

A divorce, *causâ adulterii* will be à *mensâ & thoro* only. *Co. L. 235. a. Vide ante, (C 4.)*

For such a divorce arises upon a cause subsequent, not antecedent to the marriage. *Cro. Car. 462.*

So, a divorce, *causâ professionis*, does not bastardize the issue.

And therefore, if a man, after a divorce à *mensâ & thoro*, marry another woman, the second marriage is void. *R. Mo. 683. Co. L. 235. a. Vide ante, (B 3. 6.)*

If the husband releases a legacy, given to the wife during the divorce, it will be discharged. *R. Mo. 665. D. Cro. Car. 463.*

But if the husband sells a term for years, which he has in right of his wife, equity will grant an injunction. *R. Ej. Ca. 43. (2d part of 2 Mod. C1.)*

(C 6.)

(C 6.) How a Divorce shall be obtained.

Si vir aut uxor convolat ad secundas nuptias, instituenda est lis per legitimum virum contra uxorem & superinductam, aut è contra per legitimam uxorem contra virum & superinductam, in causa divortii à vinculo matrimonii & restitutione obsequiorum conjugum. Ought. Ordo. Jud. 283.

Sic solet fieri pro nullitate matrimonii inter impuberes, si ante aetatem requisitam dissentit una partium. Ought. Ord. Jud. 284.

Sic pro nullitate matrimonii in gradu consanguinitatis, aut affinitatis. Ought. Ord. Jud. 286.

Aut ubi pars aliqua est inhabilis, causâ impotentiae, &c. Ought. Ord. Jud. 286.

But a divorce cannot be prosecuted after the death of the parties. *R. 1 Rol. 360. H. 1 Sal. 121.*

So, a marriage cannot be drawn in question upon any collateral surmise, after the death of the parties; and if it be, a prohibition goes. *1 Rol. 360. l. 50. 52.*

So, a divorce by sentence, in the life of the parties, cannot be re-examined after the death of the parties. *R. 2 Cro. 186.*

So, after the death of the husband, the marriage shall not be drawn in question, tho' the wife be alive. *1 Rol. 360. l. ult.*

Nor, after the death of the wife, tho' the husband be alive. *Carth. 271.*

And if a marriage was incestuous, and a suit commenced for it against husband and wife, and one of them dies, tho' they may proceed against the survivor to enforce penance, yet if they proceed to bastardize the issue, a prohibition goes. *R. Carth. 271. Comb. 200. 4 Mod. 182.*

(C 7.) The Effects which follow.

If there be a divorce à vinculo matrimonii, the issue between them will be bastards. *Vide Bastards (A).*

And a sentence for divorce stands in force, till reversed by appeal. *1 And. 185. 2 Leo. 169. 5 Co. 98. b.*

So, a sentence for nullity of a marriage in causa jactitationis maritagii. *R. Carth. 225.*

And if the parties die, an examination will not be allowed to prove an heir contrary to the sentence. *R. 2 Cro. 186. 7 Co. 43.*

(D) Husband and Wife are one Person.

(D 1.) In what Respect.

(D 1.) *The one cannot make* **H**USBAND and wife are one person in an estate to the other.] law. *Lit. f. 168. 291.*

And therefore, by no conveyance at the common law, could the husband give an estate to his wife. *Co. Lit. 112. a. 187. b.*

Nor, the wife to her husband. *Co. L. 187. b.*

[But articles of agreement between them, for the wife to allow the husband so much out of an estate left to her separate use, are binding in equity without the intervention of the trustees, as an execution of the power. *Moore v. Ellis, H. 1725, Bunb. 205.*]

[A gift

[A gift by the husband to the wife, without intervention of trustees, held good in equity. *Mitchel v. Mitchel*, T. 1712, *Bunb.* 205.]

So, an husband cannot covenant or contract with his wife. *Co. L. 112. a.*

[Husband, lord of a manor, cannot grant lands to his wife, immediately, by a copy of court-roll. *Firebrass v. Penant*, M. 5 G. 3. 2 *Will.* 254.]

So, if a man make a bond or contract to a woman, and they afterwards intermarry, the bond or contract is discharged. *D. Cro. Car.* 551.

So, if two men make a bond or contract to a woman, or *à contra*, and one of them marries with her, the bond, &c. is discharged. *D. Cro. Car.* 551.

Tho' it be intended for the advantage of the wife during the coverture; as, that she shall have such rents, &c. at her disposal. *Ca. Ch.* 21. 117.

But now, by the *stat.* 27 *H.* 8. the husband may make an estate to his wife: as, if he make a feoffment to the use of his wife for life in tail, or in fee, the estate will be executed by the *stat.* 27 *H.* 8. and the wife will be seised. *Co. L.* 112. *a.*

So, if the husband covenant to stand seised to the use of his wife. *Co. L.* 112. *a.*

So, the husband may devise to his wife; for that does not take effect till after his death. *Co. L.* 112. *a. b.*

And this, where by custom he might devise at the common law. *Lit. f.* 168.

So, where the husband or wife act *en autre droit*, the one may make an estate to the other; as, if the wife has an authority by will to sell, she may sell to her husband. *Co. L.* 112. *a.*

So, a covenant or contract by a man with a woman is not destroyed by their marriage, where the thing is future, to be done after the marriage determined; as, to leave his wife worth so much after his death. *R. per two J. Hob. cont. Hut.* 17. *Hob.* 216. *R.* 2 *Cro.* 571. *Per two J. Holt, cont. Hil.* 11 *W.* 3. *B. R. inter Gage & Aston*, (*Com.* 67.) 1 *Sal.* 326. *R. Pal.* 99. *Carth.* 512. [1 *Ld. Raym.* 515.]

[A bond conditioned for the payment of money after the obligor's death, made to a woman in contemplation of the obligor's marrying her, and intended for her benefit, if she should survive, is not released by their marriage. *Milbourn v. Ewart*, *B. R. M.* 34 *Geo.* 3. 5 *T. R.* 381.]

[If a bond, on marriage, be given to trustees conditioned to leave the intended wife a sum of money, and the wife be made the executrix of the obligor, she may retain the amount of the bond, and plead such retainer to an action brought against her by another bond creditor of her husband. *Marriott v. Thompson*, *C. P. M.* 13 *Geo.* 2. 7 *Mod.* 8vo. edit. 292. *Willes*, 186. *S. C.*]

[*Secus*, if the bond be conditioned to pay the trustees the money in trust for the wife; but in such case the wife may pay the trustees out of the assets, or pay out of her own money and retain assets *pro tanto*, or confess judgment to the trustees to cover assets. *Ibid.*]

That she may make a disposition by her will. *Ca. Ch.* 118.

So, the marriage does not defeat a breach before. *R. Skin.* 409. So,

So, a covenant for the benefit of the wife, tho' destroyed by the marriage, shall be aided in equity. *R. 2 Ver. 481.*

So, an agreement to make a marriage settlement shall be decreed in equity after the marriage, tho' it was to be made before the marriage. *R. 2 Vent. 343.*

So, an agreement, to permit the wife to dispose of so much money during her coverture. *Dub. 1 Ver. 409.*

(D 2.) *Take a joint estate by entierties.*] So, if an estate be granted, or conveyed to an husband and wife, and their heirs, they do not take by moieties, as other joint-tenants, but the entire estate is in both. *R. 2 Lev. 39.*

And, if an estate be granted to an husband and wife, and another person, the husband and wife have but one moiety, and the other the other moiety. *Lit. f. 291.*

And therefore, if husband and wife have a joint-estate, and the husband commit treason, and dies, the wife shall recover the entire estate from the king, who seized it as forfeited. *Co. L. 187. a.*

So, if an estate be granted to husband and wife and their heirs, where the husband is a villein, and the wife free, and the lord enters, and the wife survives; she shall have the whole. *Co. L. 187. b.*

If husband and wife take an estate, and the husband alone aliens the whole, it is not good for a moiety. *Semb. Co. El. 187. b.*

So, if an estate be granted to husband and wife and another person, and the husband, by feoffment, aliens the whole, and the wife survives, and dies; the other person shall have the entire estate; for he and the wife surviving were joint-tenants of the right of the whole estate, and therefore he shall have the whole by survivor. *Co. L. 187, 8. 327. b.*

So, if an estate be granted to a man and a woman and their heirs, who marry before the estate is completely conveyed, they take by entierties; as, if there be feoffment to a man and a woman, who marry, and then livery is made *secundum formam chartae*, they take by entierties. *Co. L. 187. b.*

So, if there be a grant of a reversion to them, and they marry before attornment. *Co. L. 187. b.*

So, if there be a feoffment to them with warranty, and afterwards they marry, and recover in value, they shall have the estate recovered by entierties. *Co. L. 187. b. Dy. 149. b. in marg.*

[A mortgagee of a copyhold estate in possession under a forfeited mortgage, and considered as irredeemable, devised it as land to husband and wife in fee; the conveyance of the husband alone, without the concurrence of his wife, passes no interest against the wife surveying. *Doe v. Parrat, B. R. T. 34 Geo. 3. 5 T. R. 652.*]

(D 3.) *When they take by moieties.*] But, if an estate were conveyed to the use of a man and woman, who afterwards marry, and then the *stat. 27 H. 8.* is made, they have moieties; for the statute executes the use in the same quality, &c. *Co. L. 187. b. R. Mo. 92. Dy. 149. b.*

So, if it be to them in tail, as well as in fee-simple. *R. Mo. 92.*

So, they do not take by entierties, if the estate be expressly limited to them in severalty; as, if it be to *A.* for life, to the husband in tail, and to the wife for years. *Co. L. 187. b.*

(E) What the Husband shall have by the Marriage.

(E 1.) Freehold.

IF a woman be seised of an estate of inheritance, and marries, her husband shall be seised in her right. *Co. L. 351. a.*

And the husband has a freehold in the right of his wife, upon which there may be a remitter. *Ibid.*

And the husband may take a release, or confirmation to enlarge his estate. *Co. L. 299. a.*

But yet the wife has such an interest, that if she be attainted of felony before issue by her husband, the lord may enter for the escheat. *Co. L. 351. a.*

And if the husband be attainted of treason or felony, the king shall not have the freehold, but only the pernancy of the profits during the coverture. *Co. L. 351. a.*

[If a leasehold is settled on marriage, the term expires and is renewed for three lives, and, on the death of the husband, comes to his daughter a *feme-covert*, who dies, leaving a daughter; she is entitled as special occupant, and the husband has no right. *Hearle v. Greenbank*, P. 1749, 3 *Atkyns*, 695. 1 *Vesey*, 298.]

(E 2.) Chattels Real.

So, if a woman be possessed of a chattel real, by her marriage the husband shall have it in her right: as, if she was possessed of a term for years. *Co. L. 46. b. 351. a. 300. a.*

So, if she had the trust of a term, the husband shall have it, except in special cases. *Vide in Chancery*, (2 M 9.)

So, if she had a wardship, the husband shall have it. *Co. L. 351. a. Pl. Com. 294. a.*

So, an estate by statute-merchant, staple, or *elegit*. *Co. L. 351. a.*

So, every chattel real in possession. *Ibid.*

If the husband survive his wife, he shall have the whole interest which his wife had in such chattel real. *Co. L. 46. b. 351. a. 300. a.*

And that, without taking out administration to her. 1 *Roll. 345. l. 40. Semb. Eq. R. 234.*

If husband and wife mortgage a term of the wife's, and the husband survives, he shall have the equity of redemption. *R. Hob. 3.*

If the wife has a copyhold for years, and takes husband, who survives, he shall have it for the residue of the term. *R. Dy. 251. a. 3 Leo. 9.*

So, the husband in his lifetime may dispose of all his wife's interest in such chattel real, by grant, or demise. *Co. L. 46. b. 351. a. 1 Roll. 343. l. 15.*

So, the interest of a term, &c. which they have jointly. 1 *Roll. 343. l. 12.*

So, the husband may forfeit such chattel real by his outlawry, or attainder; for that is a disposition in law. *Co. L. 351. a. R. Pl. Com. 263. 1 Roll. 851. l. ult. Lane, 54.*

So, the sheriff may sell upon an *elegit*, for the debt of the husband. *Co. L. 351. a.*

So, it may be extended upon a statute, or recognizance of the husband.

So, he may grant it upon condition, which will be a disposition, tho' the executor enter for the condition broken. *Co. L. 46. b.*

So, if the husband recover the term in an ejectment in his own name, it is a disposition. *Ibid.*

So, the husband may dispose of part of his wife's interest: as, he may demise for part of the years, rendring rent, and the rent shall go to his executor or administrator, tho' the wife survive. *Ibid.*

So, he may make a lease, to commence after his death, and it will be good, tho' the wife survive. *R. Cro. El. 287. Poph. 5. Mo. 395.*

So, if he submit to the arbitrament of *B.* who awards the term to *A.*, it will be a disposition by the husband against his wife. *Dy. 183. a. in marg.*

So, if tenant in dower, lease for years, take husband, and die, the husband shall have the rent in arrear in his wife's lifetime. *R. Mo. 7.*

But the husband cannot devise a chattel real which he had in right of his wife. *Co. Lit. 351. a. 1 Rol. 344. l. 15. Pl. Com. 418. b. R. Poph. 5.*

So, he cannot charge such chattel real, beyond the coverture. *Co. L. 351. a. Pl. Com. 418. b.*

If there be judgment against the husband, execution cannot be sued after his death against the term. *1 Rol. 344. l. 21. 346. l. 17.*

So, the term after the death of the husband shall not be extended upon a statute, or recognizance acknowledged by the husband. *1 Rol. 346. l. 17.*

Nor, for a debt to the king due from the husband. *Semb. 2 Rol. 157. l. 30. 1 Rol. 346. l. 20.*

So, if the wife had a chattel real only *en auter droit*, as executor or administrator, the husband cannot dispose of it. *Co. L. 351. a.*

[But if the wife had it as executrix to 2 former husband, he may. *3 Wilf. 277.*]

So, if the wife was guardian. *Pl. Com. 294.*

So, if a woman was joint-tenant of the chattel real, and marries, and dies; the husband shall not have it, but it survives to the other joint-tenant. *Co. L. 185. b.*

So, if the wife had only the possibility of a term, the husband cannot dispose of it: as, if there be a lease to husband and wife for their lives, and afterwards to the executor of the survivor, the husband cannot grant this executory interest. *Co. L. 46. b. 351. a. R. 10 Co. 51. a.*

So, if a woman be dispossessed of a term, and takes husband and dies before recovery of the possession, the husband shall not have it. *Co. L. 351. a.*

So, the husband, if he survives, shall not have a right of ward, or other chattel real in action. *Ibid.*

So, if the husband does not dispose of the chattel real of his wife, if she survive him, she shall have it. *Co. L. 46. b. 351. a. 1 Rol. 349. C.*

So, all that was not disposed of by the husband: as, if a term be demised by the husband for part of the years, the wife shall have the residue. *Co. L. 46. b.*

So, if he demise, reserving part, the wife shall have the part excepted. *1 Rol. 344. l. 38.*

If

If he demise the term, *if A. so long live*, she shall have the possibility. 1 *Rol.* 345. l. 2.

If the term be extended, the wife shall have it after the extent satisfied. 1 *Rol.* 344. l. 25.

If the husband and wife mortgage the term, and the husband pay the money, and enter, and die, the wife shall have it. *R. 1 Rol.* 344. l. 45. 50.

(E 3.) Chattels Personal.

All chattels personal, which the wife has in possession in her own right, are vested in her husband by the marriage, tho' he do not survive. *Co. L.* 351. b. [3 *T. R.* 631.]

So, chattels personal, not in possession at the time of the marriage, if they are reduced into possession during the coverture. *Co. L.* 351. b.

So, if the husband make a letter of attorney to one, to receive a debt or legacy due to the wife, who receives it, tho' he does not pay it to the husband, yet it vests in his possession. *R. 1 Rol.* 342. l. 40. 45. *Mo.* 452.

So, if the wife's portion be secured by settlement of land, and he makes a jointure for it, it shall be vested in the husband, tho' it be not paid. *Per Lord Keeper, Ca. Ch.* 189.

So, if the husband and wife have a judgment for the debt of the wife, but no execution; the husband, if he survives, shall have it, and shall take out execution without a *scire facias*. *R. 1 Mod.* 179. 3 *Mod.* 189. 1 *Sid.* 337.

So, chattels personal of a mixt nature, partly in possession, and partly in action, the husband shall have, if he survives: as, an avoidance of a church, which falls during the coverture. *Co. L.* 351. a.

So, arrearages of rent service, charge, or feck, which incur during the coverture. *Co. L.* 351. a. *Vide post.* (F 1.)

So, if chattels are given to the wife after the coverture, the interest vests in the husband.

Tho' he has not possession of them before the death of his wife.

So, if a legacy be given to a *feme-covert*, to be paid twelve months after his death, and the wife die within the twelve months, the interest goes to the husband; for it was vested in him, and he might release within the twelve months. *Per Mont.* 2 *Rol.* 134.

So, if there be judgment for the husband alone, in an action by him alone for the debt of the wife, the husband shall have it. 1 *Ver.* 396. [3 *T. R.* 631.]

So, if an award be made to pay a debt due to the wife, to her husband, tho' the husband die before payment. [1 *Ver.* 396.]

[If a widow has a decree for arrears of jointure, marries, a report of the arrears, confirmed, and the husband assigns said arrears, and all subsequent, and all benefit of the decree, and demises the jointure during the joint lives of him and his wife to trustees, in trust after the wife's death, to pay a bond from the husband to *A.*, and a debt from him to *B.*, and the residue as he should by deed or will appoint, and first the husband dies and then the wife. The bond shall first be paid to *A.*, then the debt to *B.*, and the residue to the administrator of the husband, not of the wife. *Ld. Carteret v. Paschall, T.* 1733, 3 *P. W.* 197.]

[If *A.* survives her first husband, who leaves her a legacy, marries *B.*, dies, *B.* administers, dies, his administrator gets in the legacy; he is entitled to it, and not the administrator *de bonis non* of *A.*, who shall be considered in equity as a trustee for the administrator of *B.*, and if he brings bill for it, it is a breach of trust, and he shall pay costs. *Humphrey v. Bullen*, *P.* 1737, 1 *Atkyns*, 458.]

[Trinkets and jewels, given to a wife before marriage, become the husband's again by the marriage, and are liable to his debts, if his personal estate is not sufficient. *Ridout v. E. Plymouth*, *M.* 1740, 2 *Atkyns*, 104.]

[If husband dies, without administering to the personal estate the wife had in her own right, it goes to his representative, and vested in him before administration taken out, and not to her next of kin. *Elliot v. Collier*, *T.* 1747, 3 *Atkyns*, 526. 1 *Wils.* 168.]

[And tho' administration is granted to such next of kin, (as the ecclesiastical court by 31 *Ed.* 6. c. 11. is bound to do,) yet in equity he is looked on as a mere trustee. *Ibid.*]

But *choses in action* are not vested in the husband by the marriage, tho' he survive: as, debts upon bond or contract, unless they are recovered. *Co. L.* 351. b. [2 *Vesey*, 677. 3 *T. R.* 631.]

So, a debt to the wife, tho' the debtor be a bankrupt, and the husband pay the contribution, if he does not receive the debt. 2 *Ver.* 707.

An estray in the manor of the wife, unless it be seized by the husband. *Co. L.* 351. b.

A portion due to an orphan in the hands of the chamberlain of London, unless it be recovered, or received by the husband; for it is a *chose in action*. *R.* 2 *Vent.* 341. *R. Ca. Ch.* 182. *Vide Guardian*, (G 2.)

[If husband is attainted of felony, and pardoned on condition of transportation for life, and afterwards the wife becomes entitled to an orphanage share of personal estate, it shall not belong to the husband but to the wife. *Semb. Newsome v. Bowyer*, *T.* 1729, 3 *P. W.* 37.]

So, a distributive part due to the wife, by the *stat.* 22 & 23 *Car.* 2. upon the distribution of an estate of an intestate; for it is a *chose in action*, till the husband receive or recover it. *Semb. Sho.* 25.

A mortgage to the wife. 2 *Ver.* 402.

Reliefs, or rents due before marriage. *Co. L.* 351. b.

Yet the husband is entitled to be administrator to his wife. *Vide in Administrator*, (B 6.)

And now, by the *stat.* 32 *H.* 8. 37. arrears of rent, due before coverture, are given to the husband. *Co. L.* 351. b.

So, chattels personal, which the wife has *en auter droit*, as executrix or administratrix, are not vested in the husband by the marriage. *Co. L.* 351.

Tho' the husband and wife have a judgment for a debt due to the wife's testator. *R. Jon.* 248.

Nor, chattels, of which she has a bare possession, as by bailment, or trover. *Co. L.* 351. b.

[If a woman, having obtained interlocutory judgment, marries before final judgment, and after final judgment, husband and wife bring *scire facias quare*, &c. the court will not set it aside on motion, but

but put defendant to his *audita querela*. *Ld. Sutherland v. —, P. 1739, Bunb. 282.*

[So, if a woman plaintiff, marries after interlocutory judgment, and then executes writ of inquiry. *Chubbs v. Billington, T. 1730, Bunb. 283.*]

(F) What goes to the Wife.

(F 1.) If she survives.

CHATTELS real, which the husband had, in right of his wife, she shall have, if she survives; and they do not go to the executor or administrator of the husband. *Vide ante, (E 2.)*

So, a chattel real, which the husband and wife have jointly.

So, a statute, recognizance, or obligation made to the husband and wife; for they are joint-tenants of it, and it survives to the wife. *1 Rol. 342. l. 27. 29.*

So, if the wife and her husband were joint-tenants of a rent-charge, &c. for their lives, the wife, if she survives, shall have the arrearages incurred during the coverture. *1 Rol. 350. l. 11. Mo. 887.*

So, if husband and wife make a demise of the wife's land, rendering rent, and the assent after the death of the husband, she shall have the arrearages incurred during the coverture. *1 Rol. 350. l. 14.*

So, if a woman seised of a rent-service, &c. marry and survive, she shall have the arrears during the coverture. *1 Rol. 350. l. 5. Ca. Ch. 189.*

So, if she demise for life or years, and then marry and survive. *1 Rol. 350. l. 7. 17.*

[If a wife, having separate estate by marriage-settlement, advances money to pay off incumbrance on husband's estate, and the receipt is delivered to her, it is a loan, and she shall stand in the place of the mortgagee. *Partridge v. Powlet, T. 1742, 2 Atkyns, 383.*]

[If husband has a mortgage on his own estate, and his wife joins with him in charging her own, if she survives, she shall stand in the place of the mortgagee, and be satisfied out of the husband's estate. *Ibid.*]

So, chattels of a mixt nature, which the husband shall have if he survive, the wife shall have if she survive. *Vide ante, (E 3.)*

So, if the husband alien part of a term, which he has in right of his wife, the wife shall have the residue, if she survives. *Cro. El. 33.*

So, if the wife has an annuity for life, and the husband release to the grantor by deed, and die, the wife shall have it; for the release of the husband discharges it only during the coverture, it being an estate for life. *R. Mo. 522.*

So, if there be a judgment for husband and wife, upon a debt due to the wife, she surviving shall have it. *1 Ver. 396.*

[If husband recovers a judgment for the debt of the wife, and dies before execution, the wife is entitled, not the husband's executor. *Bond v. Simmons, M. 1743, 3 Atkyns, 20.*]

So, if there be a decree in equity for the husband and wife, for a legacy given to the wife. *1 Ca. Ch. 27. 1 Ch. R. 234.*

So, goods which the wife has as executrix or administratrix. *R. 1 And. 22. Bend. Pl. 252. Dy. 331. a.*

So, money in the hands of a trustee for a *feme-covert*, if the husband makes no disposition of it. *1 Ver. 161. Vide ante, (E 3.)*

So, money charged upon land for the wife's portion, and which *A.* covenants to pay to the husband, tho' the husband settles a jointure upon the wife. *R. 2 Ver. 191.*

So, a mortgage, or other *chose in action*, tho' the husband assigns it to another, who agrees to dispose of it for the husband and wife in a purchase. *R. 2 Ver. 402.*

[If there is a settlement in consideration of marriage, and of the present fortune of wife *A.*, and of certain covenants after mentioned, one of which is, that her mother shall pay her husband 200*l.* as addition to *A.*'s fortune; another with the trustees, that mother shall give *A.* or her executor, or one of her children, equal to what she gives her other children; and she by will gives a legacy and makes her executrix, and part of the residue lapses to *A.* by the death of a legatee in testatrix's life, and the husband assigns over these sums, with proviso that assignee on request shall resign; and *A.* survives him and dies, these sums survive to *A.*'s representative. *Garforth v. Bradley, T. 1755, 2 Vesey, 675.*]

(F 2.) Tho' she does not survive.

So, chattels real or personal in action, which were not vested in the husband during the coverture, go to the executor or administrator of the wife, tho' the husband survives; but the husband may be administrator. *3 Mod. 186. Vide ante, (E 2, 3.)*

[Diamonds given to the wife by the husband's father on the marriage, are a gift to her separate use, and she is entitled to them in her own right. *Graham v. Londonderry, M. 1746, 3 Atkyns, 393.*]

[So, a present from a stranger during the coverture. *Ibid.*]

[So, trinkets given by the husband in his lifetime. *Ibid.*]

(F 3.) *Paraphernalia.*

So, the wife shall have, after the death of her husband, as her *paraphernalia*, a necessary bed, and apparel, agreeable to the quality of her husband. *1 Rol. 911. l. 20.*

Necessary and convenient apparel. *1 Rol. 911. l. 25. 30, 31.*

So, if the husband deliver cloth to his wife for her apparel, and die before it be made, she shall have the cloth. *R. 1 Rol. 911. l. 35.*

So, pearls and jewels to the value of 370*l.*, which the wife used for ornament in the lifetime of her husband, being suitable to her degree, were allowed as *paraphernalia*. *Cro. Car. 343. 1 Rol. 911. l. 45. Jon. 334.*

[The value of the jewels makes no difference. *Northey v. Northey, M. 1740, 2 Atkyns, 77.*]

[The husband's possession makes no difference, if the wife wore them whenever she was dressed. *Ibid.*]

[A wife as to *paraphernalia* has been of late considered as a creditor, and having a lien on real estate. *Ibid.*]

[Where

[Where there have been debts standing out against a husband, a wife has been admitted as a creditor to the value of her *paraphernalia*, on trust-estates created for payment of debts. *Ibid. Incledon v. Northcote, H. 1746, 3 Atkyns, 430.*]

[Where a husband gives jewels to his wife, merely to be worn as ornaments of her person, (tho' he might have given them to her separate use, yet) in this case they are only *paraphernalia*. *Graham v. Londonderry, M. 1746, 3 Atkyns, 393.*]

[The husband may alien all such jewels as a wife has to wear for the ornament of her person in his lifetime. *Ibid.*]

[Jewels which a wife did not wear at all times, but only on birthdays and on public occasions, are *paraphernalia*. *Ibid.*]

[If a husband pledges a diamond necklace, which his wife has been used to wear, as a collateral security for money borrowed on bond, and gives power to the pawnee to sell it for a sum certain, during his absence, yet this is not a sale, nor does alien it, if not sold in his life, and it only stands as a pledge. *Ibid.*]

[If husband pawn his wife's *paraphernalia* and dies, leaving sufficient to redeem, and pay all his debts, she is entitled to have it redeemed out of his personal estate. *Ibid.*]

So, jewels to the value of 500 marks, for the wife of a viscount. *R. 2 Leo. 166. Mo. 213.*

The property of the *paraphernalia* is vested in the wife presently upon the death of her husband. *Cro. Car. 344. Jon. 333.*

But the wife shall not have ornaments as her *paraphernalia*, where there are not assets for payment of debts. *Cro. Car. 346. 1 Rol. 911. l. 50. 35. Per Manwood, Mo. 216. Ch. R. 416. [Ridout v. E. Plymouth, M. 1740, 2 Atkyns, 104.]*

[Altho' where the husband dies indebted, the widow cannot have her *paraphernalia* at law, yet equity will direct that she shall stand in the place of specialty creditors as to the real assets. *Snellson v. Corbet, T. 1746, 3 Atkyns, 369.*]

[If simple contract creditors are not satisfied out of the personal estate, nor by standing in the place of specialty creditors out of the real estate, the *paraphernalia* shall be applied to make good the deficiency, but not to legatees. *Ibid.*]

Or, for payment of debts and legacies. *Semb. Cro. Car. 346. Court divided. Jon. 333. Ch. R. 146.*

If the grandfather give 2000*l.* to *A.* for a portion, who releases it at his father's request, upon a promise to take care that his portion be otherwise paid, the wife of the father shall not have her *paraphernalia* before the portion paid; for it is a debt. *Ch. R. 146.*

So, the wife cannot claim jewels, &c. as her *paraphernalia*, where her husband has devised them by his will. *Semb. Cro. Car. 346. 1 Rol. 911. l. 50. R. cont. Ca. Ch. 240. Per two J. cont. Jon. 334.*

Or, disposed by his deed in trust for the wife for life. *Semb. 1 Ch. R. 27.*

Or, makes a jointure or settlement upon his wife, in bar of all demands out of his personal estate. *R. 2 Ver. 49. 83.*

[A husband cannot devise the *paraphernalia*, and if he do, the court will decree them to the wife, and give costs out of the husband's estate. *3 Atkyns, 217.*]

[The husband by will gave his wife 10,000*l.*, on condition that she

she should give up her right of dower, and devised to her all her wearing apparel, ornaments of her person, her gold watch and jewels, except some round a picture, and devised the residue of his estate to A., and then by codicil revoked the devise of his jewels and her pearl necklace, which he gave to B., and by another codicil give his wife a pair of diamond ear-rings; it was decreed, that she should have her *paraphernalia* notwithstanding. 3 *Atkyns*, 358.]

[But if a freeman's wife before marriage is expressly barred of every thing she can claim, by common law, custom of *London*, or otherwise, she has no right to *paraphernalia*; and tho' her husband, by will, leaves her her jewels and personal ornaments of every kind, she cannot have them, for he could dispose of only half his personal estate. *Read v. Snell*, T. 1743, 2 *Atkyns*, 642.]

So, if a wife does not claim her *paraphernalia*, her executor or administrator after her death cannot claim them. 2 *Ver.* 246.]

Yet apparel necessary or convenient the wife shall have against the devise of the husband; for she ought not to be naked, or exposed to shame or cold. R. 1 *Rol.* 911. l. 55.

So, against the creditors of the husband. *Semb. Mo.* 216.

[Where there are real estates descended, the wife may be entitled to her *paraphernalia*, and stand in the place of bond creditors, but otherwise when the real estates come by the husband. *Probert v. Morgan*, M. 1739, 1 *Atkyns*, 440.]

[Where there is no trust on real estate for payment of debts, the wife cannot stand in the place of creditors, nor come on it at all events to be satisfied her *paraphernalia*. *Ridout v. E. Plymouth*, M. 1740, 2 *Atkyns*, 104.]

(G) What Acts by the Husband and Wife bind the Wife.

(G 1.) Alienation by Fine.

IF husband and wife levy a fine of the freehold or inheritance of the wife, she shall be thereby barred for ever; because she shall be examined by the justices upon the fine. Co. L. 353. b. 1 *Rol.* 347. l. 17.

So, if they levy a fine of land which they have jointly.

Tho' they are afterwards divorced *à vinculo*. 2 *Rol.* 20. l. 30. *Mo.* 477.

So, if the husband and wife sell the land of the wife, and afterwards levy a fine to the vendee. 2 Co. 57.

So, a fine by husband and wife binds the wife tho' the uses are declared by the husband alone; for the assent of the wife shall be intended, if her assent does not appear. R. 2 Co. 57. 2 *Rol.* 798. l. 10. 25.

Tho' the wife was within age at the time of the declaration of uses. 2 *Rol.* 798. l. 13.

So, if they both join in declaring the uses to a mortgagee, the husband alone may afterwards declare the nature of the agreement, to shew, that it was not usurious, tho' the wife dissent. R. 2 *Rol.* 798. l. 30.

So, if the wife declare the uses without her husband, it will be void. R. *Skin.* 275. If

If the deed, by which the uses are declared, be made between the husband and the wife only, whereby it can only be a deed-poll, yet it is sufficient to declare the uses of the fine. *D. 4 Mod. 264. Vide Uses, (D 1.)*

But a fine by husband and wife, where no uses are declared, will be to the use of the wife only. *R. 2 Co. 58. b. Mo. 197.*

If the husband declares the uses of the fine, and the wife makes a contrary declaration, the uses by each of them are void. *R. 2 Co. 57. Mo. 197.*

So, if they differ in the declaration of the uses, tho' they agree as to some uses, the declaration is void for the whole. *R. 2 Co. 58.*

So, if an indenture be prepared by both to declare the uses, and the husband executes, but the wife refuses, the uses are void, tho' the wife does not make a contrary declaration, and tho' her dissent does not appear by the deed. *R. 2 Rol. 798. l. 20.*

So, if there was a fine by husband and wife when the wife was within age, it may be avoided during her nonage, by error.

Or, upon examination, it may be vacated by the court *quoad* the wife, without a writ of error. *R. 3 Lev. 36.*

(G 2.) By Common Recovery.

So, if a common recovery is suffered by husband and wife of the wife's lands, this is a bar to the wife; for she ought to be examined upon the recovery. *Pl. Com. 514. a. 10 Co. 43. a. 1 Rol. 347. l. 19. Vide in Recovery, (B 1.)*

So, if husband and wife are vouchees in a common recovery, the recovery shall be a bar, tho' the wife be not examined; for tho' it be proper that she be examined, yet that is not necessary, and is frequently omitted. *D. 1 Sid. 11. Per Rolle, Sti. 319, 320.*

But where husband and wife are jointly seised in tail, a common recovery against the husband alone is void for the whole. *R. 3 Co. 5. a. Mo. 210.*

So, if the husband alone come in as vouchee. *Semb. 3 Co. 6. b.*

So, if the husband and wife are jointly seised for life, and to the husband in tail, a recovery upon a *præcipe* against the husband alone is void for the whole. *R. 3 Co. 5. 2 Rol. 395. l. 30.*

Tho' the husband afterwards survive, and the wife had a voidable estate. *R. 3 Co. 5.*

Yet, if the husband alone comes in as vouchee, it is good, except as to the wife. *R. 3 Co. 6. a. 2 Rol. 395. l. 35.*

So, a recovery of the wife's inheritance, where the husband bargains and sells it, and the remainder-man is vouchee, is a bar to the remainders, tho' not to the wife. *2 Rol. 394. l. 10.*

So, where husband and wife have for life before coverture, and to the husband in tail, a recovery upon a *præcipe* against the husband alone is good for a moiety. *R. Mo. 95.*

(G 3.) By Demise.

So, by the *stat. 32 H. 8. 28.* leases by any of full age, seised in right of his wife, or jointly with his wife, of any estate of inheritance, made before coverture, or after, being by writing indented under seal, shall be good against the lessor, his wife, and their heirs, and every of them. *Vide in Estates, (B 32.—G 4, 5.)* Not

Not to extend to leases of lands, &c. in farm by virtue of any old lease, unless the same be expired, surrendered, or ended within one year after such lease.

Nor, to a grant of any reversion.

Nor, to leases of land, not most commonly letten by the space of 20 years next before such lease.

Nor, to leases without impeachment of waste.

Nor, to leases for more than 21 years, or three lives from the day of making.

And, that on every such lease be reserved yearly during the lease, payable to the lessors, and those to whom the reversion shall belong, the most accustomable rent paid for the same lands, within 20 years next before such lease.

And, that the wife be made party to the lease, by any husband of the inheritance of his wife, and such lease shall be by indenture, in the name of the husband and wife, and she to seal the same; and the rent shall be reserved to the husband and wife, and the heirs of the wife, according to her estate.

And therefore, a demise by husband and wife, by indenture under their hands and seals, of the land of the wife in possession usually demised, if it be for three lives, or 21 years, or a less estate, rendering the usual rent during the term, to the husband and wife, and the heirs of the wife, and not dispunishable of waste, shall be good against the wife and her heirs.

So, a demise by husband and wife, by indenture for three lives, *habendum* after *Michaelmas*, and they make livery after *Michaelmas*, is good; for the lease does not take effect by the livery without deed, but by the deed and livery together. *R. 2 Cro. 563.*

So, a demise by indenture by the husband alone, (his wife not being a party,) where they are jointly seised, shall be good against the wife within the *st. 32 H. 8. 28.* for the proviso, which requires the wife to be party, extends only to a lease of land, of the inheritance of the wife. *Senib. per three J. Hob. cont. Cro. Car. 22.*

So, a demise by husband and wife, pursuant to the statute, will be good, tho' the wife be an infant; for the statute says only, *if any of full age seised in right of his wife.* *3 Leo. 133.*

So, a demise by husband and wife for 60 years, if they so long live, is good within the statute. *Adm. Cro. Car. 22.*

So, a demise by deed by husband and wife, of the land of the wife, not pursuant to the statute, is a good demise of both during the coverture, and may be pleaded as their demise. *R. 2 Co. 61. b. 3 Co. 16. 21. b. Sav. 110.*

So, if there be a demise for years, with a letter of attorney, signed by both, to deliver the lease upon the land; tho' the wife cannot make an attorney. *Cont. per three J. 2 Cro. 617. R. per three J. cont. Tel. 1. R. acc. Cro. Car. 165. R. acc. 2 Leo. 200.*

So, tho' there be a demise by them, without reservation of any rent. *R. Hut. 102.*

So, if there be a demise by husband and wife, by indenture, for years, of a moiety of land, which they have jointly with *B.*, and *B.* survive, he shall not have this land by survivor; for it shall be the lease of the wife till her disagreement, and there was a severance during

during the term. *R. 2 Rol. 89. l. 20. 2 Cro. 417. 1 Rol. 401. 441. 3 Bul. 272. Bridg. 42.*

But a lease by husband and wife, not conformable to the statute, may be waived, or affirmed by the wife after the death of the husband. *1 Rol. 349. l. 11. Vide post. (R—S 1, &c.)*

And a lease by them without deed, is void as to the wife. *Sav. 111. R. Dy. 91. b. R. Cro. El. 656.*

And it cannot be affirmed by her assent, after the death of her husband; for her consent, at the commencement of the lease, ought to appear by deed. *Dy. 91. b. 146. b. 1 Leo. 204.*

And if it be waived, it will be void as to the wife *ab initio*, and she may plead *non dimiserunt*. *R. 3 Co. 27. b. Co. Ent. 712. R. 1 Leo. 192.*

Yet, if a man plead demise by husband and wife, he need not plead it to be by deed. *R. 2 Co. 61. b. D. 3 Co. 16. 21. b. Sav. 111. D. Dy. 91. b. in marg. R. Cro. El. 438. 481, 2.*

Or, that any rent was reserved. *R. Cro. El. 112.*

And a lease by husband and wife without deed, may be pleaded as a lease of both, during the coverture. *D. Cro. El. 438.*

(G 4.) By Customary Conveyance.

By the custom in some cities and boroughs, a bargain and sale by the husband and wife, where the wife is examined by the mayor, or other officer, binds the wife after the husband's death. *2 Inst. 673.*

And by the *st. 34 H. 8. 22.* all such customary conveyances shall be of force, notwithstanding the *st. 32 H. 8. 28.*

So, by custom in *Denbigh in Wales*, a surrender by husband and wife, where the wife is examined in court there, binds the wife and her heirs, as a fine does; and this custom is not toll'd by the *st. 27 H. 8. 26.* for it is reasonable, and agreeable to some customs in *England.* *Per two J. Southcote cont. Dy. 363. b.*

So, a surrender of a copyhold by husband and wife, the wife being examined by the steward, binds the wife. *Adm. Litt. 274. Vide in Copyhold, (F 7.)*

(H) What Acts by the Husband and Wife do not bind the Wife.

BUT generally, the wife shall not be bound by any act, to convey her inheritance or freehold, unless she be examined. *D. 10 Co. 42. b. 1 Rol. 347. P.*

And she can be examined only upon writ. *10 Co. 42. b.*

And therefore, if husband and wife convey by deed, acknowledged by them to be inrolled, it does not bind the wife; for there was no writ depending, upon which she might be examined. *10 Co. 43. a. 2 Inst. 673.*

So, if husband and wife acknowledge a statute and recognizance, it does not bind the wife. *R. 10 Co. 43. a.*

[If money or stock is settled to be laid out in land, husband and wife cannot by contract or deed alter the nature of it to make it personal estate; but it must be invested in land, and then by fine she may

may give it her husband, or by coming into equity she may be examined and consent it shall be taken as personal estate. *Oldham v. Hughes, M. 1742, 2 Atkyns, 452.*]

(I 1.) What Acts by the Husband alone bind his Wife.

CHATTELS personal, which are vested in the husband by the marriage, he may absolutely dispose of without his wife; and if he does not dispose of them, they go to his executor or administrator. *Vide ante, (E 3.)*

So, chattels real, which he has in right of his wife, or jointly with his wife, he may dispose of, or forfeit, and the disposition binds his wife. *Vide ante, (E 2.)*

So, if the husband be seised in right of his wife for life, and make a feoffment; it will be a forfeiture during the coverture. *1 Rol. 851. l. 47.*

So, if the husband and wife join in the feoffment, or were joint-tenants. *1 Rol. 851. l. 45. 50.*

So, if a lessee for years assign his term to A. and the wife of his lessor, and the husband afterwards make a feoffment of the estate, the term which he had in right of his wife passes. *Pl. Com. 419. Mo. 171.*

So, if the husband bargain and sell the land by indenture inrolled. *Mo. 171.*

So, a right which by possibility may accrue to the wife during the coverture, the husband may discharge by his release. *Per Holt, 1 Sal. 326.*

(I 2.) What put her to her Action.

SO, by the common law, if an husband seised in the right of his wife in fee, or in tail, had made a feoffment to another, without his wife, this would have been a discontinuance, and could not have been defeated by the entry of the wife after his death. *Lit. f. 594. Vide Discontinuance, (A 3.)*

So, if the husband was jointly seised with his wife. *Co. Lit. 326. a.*

So, a fine by the husband alone, of land which he had in right of his wife, or jointly with his wife, would have been a discontinuance. *Co. L. 326. a.*

So, if the husband alone makes a gift in tail, rendring rent, and afterwards the husband and wife levy a fine of the reversion, and the husband dies, the wife shall be barred of her entry upon the donee. *R. Mo. 91.*

(I 3.) *Cui in vitâ.*] And by the common law, upon such a discontinuance, the wife had no remedy but by *cui in vitâ*, which lies, where the husband aliens an estate, of which his wife was seised for life, in tail, or in fee. *F. N. B. 193. a.*

If the wife was seised in fee, and dies before the husband, the heir of the wife shall have a *sur cui in vitâ*. *F. N. B. 193. a.*

(K) What Acts by the Husband alone do not bind his Wife.

By the Stat. 32 H. 8. 28, &c.

BUT now, by the *st.* 32 H. 8. 28. no fine, feoffment, or other act by the husband only of lands, the inheritance, or freehold of the wife, shall be a discontinuance, or prejudice the entry of her, her heirs, or such as have a right after her death.

And therefore, if the husband alone levy a fine of the wife's land, it is no discontinuance, but the wife, or her heir, may enter.

So, if a common recovery be suffered upon a *præcipe* against the husband and wife. *Co. L.* 326. *a.*

Tho' the fine, or feoffment, &c. be to the use of the king. *R.* 2 *Inst.* 681.

So, a feoffment by husband and wife, of the land of the wife, is no discontinuance; for tho' the wife joins, it is the feoffment of the husband alone. *Co. L.* 326. *a.*

So, a fine, feoffment, &c. by the husband alone, of lands, which he has jointly with his wife, is no discontinuance by this statute, any more than of land, being the inheritance, or freehold of the wife. *Co. L.* 326. *a.* 2 *Inst.* 681. *R.* 8 *Co.* 72. *a.* *R.* *Mo.* 28.

But a fine in such a case, if they are seised to them, and the heirs of their bodies, is a bar to the issue; and the estate of the wife is changed to an estate for life, without impeachment of waste. 2 *Inst.* 681, 2. *Dub. Mo.* 28.

So, a fine, &c. by the husband alone, where he was seised in right of his wife, or jointly with his wife only for life, is not a forfeiture to bind the wife, after the death of her husband. 1 *Rol.* 851. *l.* 52. *Vide* 1 *Rol.* 852. *l.* 5.

If there be a feoffment by the husband alone, and he and his wife are afterwards divorced *à vinculo*; yet the wife may enter without a *cui ante divortium*; for at the time she was his wife *de facto*. *Co. L.* 326. *a.*

If there be a feoffment, &c. by the husband alone, of the land of his wife, by this statute, after the death of the husband, the wife, or her heir, may enter. *Co. L.* 326. *a.* *Hob.* 261.

If the husband and wife were jointly seised, the heir of their bodies may enter. *Co. L.* 326. *a.* *R.* 8 *Co.* 72. *a.*

So, if the wife die without issue before entry, he in reversion or remainder, may enter. *Co. L.* 326. *a.* *Jon.* 324. *Cro. Car.* 321. *R.* *Hob.* 261.

So, if an husband seised in tail, remainder to his wife in tail, make a feoffment alone, and die without issue, his wife in the remainder may enter. *Co. L.* 326. *a.*

But the fine, feoffment, &c. binds the wife during the coverture.

So, if the husband and wife are jointly seised in tail, and the husband alone makes a feoffment, &c. and his wife dies before him, the issue shall not enter during the life of the husband. *Co. L.* 326. *a.* *Hob.* 261.

Nor, if the husband was seised in right of his wife, and had issue. *Co. L.* 326. *a.*

So,

So, if the wife before entry levy a fine, she cannot afterwards enter; for the discontinuance continues till entry, which is now barred by the fine. *R. 2 Rol. 311. Vide Discontinuance, (A. 3.)*

So, if husband and wife for life, and to the heirs of the body of the husband, remainder over, join in a fine, and the wife survives, the entry of the wife being barred by the fine, the entry of those in remainder is also barred. *R. Cro. Car. 321. Jon. 324.*

So, if the wife die without an heir, after a discontinuance by her husband, entry is not given to the lord by escheat. *Hob. 261.*

So, a thing to take effect for the wife after the death of her husband, the husband cannot discharge in his lifetime: as, if there be a promise to the wife to pay so much, if she marries *B.*, and afterwards survives; the husband by his release cannot discharge such promise. *R. 1 Rol. 343. l. 50. 2 Rol. 407. l. 45. Yel. 156. 2 Cro. 222. 1 Brownl. 15. 1 Sal. 327. Pal. 99. Vide ante, (D 1.)*

Otherwise, if there are exprefs words. *Vide 1 Rol. 343. l. 50. R. Yel. 156.*

So, if a term be granted to husband and wife for life, and afterwards to the executor of the survivor, the husband cannot grant this possibility of the executor. *Vide ante, (E 2.)*

If the wife has an annuity for life, a release by the husband does not bind his wife, if she survives. *R. Mo. 522.*

If a man has a coyphold, in which his wife by custom has her free bench, and the husband agrees that *A.* shall enjoy during the lives of himself and his wife; this does not bind his wife. *R. 2 Ver. 45. 63.*

(L) What Laches of the Husband prejudices his Wife.

IF an exprefs condition be annexed to the estate of a woman, who takes husband, the laches of the husband to perform the condition, loses the estate for ever. *Co. L. 246. b.*

As, if there be a feoffment to the wife, before or after coverture, rendring rent, upon condition to be void for non-payment of the rent; if the husband does not pay the rent, the estate is lost. *Co. L. 246. b.*

So, if there be a condition, that the rent, for non-payment at the day, shall be double. *Co. L. 246. b.*

So, the laches of an husband, to perform a condition in law which requires skill: as, if a woman has the office of parker, steward, &c. who takes husband, neglect to keep the park, &c. by the husband, will be a forfeiture. *Co. L. 233. b.*

So, if a woman has a right to land, and takes husband, the laches of the husband to make claim binds the wife: as, if tenant for life, remainder to a woman, levy a fine, and the woman takes husband, who does not enter within five years after the fine, the wife shall be bound by the fine, and non-claim. *R. Dy. 159. a. in marg.*

(M) What not.

BUT the laches of the husband to perform a condition in law, which does not require skill, or confidence, does not prejudice his wife. *Co. L. 233. b.* As,

As, if the wife be tenant for life, or for years, and her husband make a feoffment, &c. the forfeiture does not bind his wife. *Co. L. 233. b.*

(N) What Acts of the Wife prejudice the Husband.

SO, the husband shall be charged for all debts of his wife *dum sola*.
1 *Rol.* 321. l. 25. 3 *Mod.* 186.

[If infant marries a woman of full age, he is liable to her debts, and to arrests for them. *Barnes*, 95.]

So, if a woman executrix, or administratrix, commits a *devastavit*, and then takes husband, the husband, during the coverture, shall be charged for it. *R. Cro. Car.* 603. *R. Mo.* 761. *Vide Administration D.* *Vide post.* (2 B—2 C).

[But where the wife lives apart from her husband under articles of separation with a separate maintenance, the husband is not liable even for necessities. 1 *Term Rep.* 10.]

[But in such case, she may contract and be sued as a *feme-sole*. *Id.* 9.]

[Tho' she alien the whole of her separate maintenance. *Id.* 10.]

[And if she be afterwards divorced and marry again, her second husband shall be charged with debts contracted by her while living apart from her first husband under her separate maintenance. *Id. ibid.*]

(O) The Power of the Husband during the Coverture.

THE husband, during the coverture, may take the rents and profits of the whole estate of his wife.

If there be a lease by the wife *dum sola*, payment of the rent ought to be to the husband; and payment to the wife without the husband's order, tho' there be no notice of the marriage, shall not discharge the lessee. *R. Pal.* 210.

So, he has the sole disposition of all interests of his wife: and therefore, if the next avoidance be granted to husband and wife, the husband alone may present. *Lit. f.* 13.

For an interest which vests in the wife, or accrues to her during coverture, he may sue alone, or with his wife. *Vide post.* (X).

If a legacy be given to the wife, the husband alone may take or release it. 1 *Sal.* 115.

Tho' the wife was divorced *à mensâ & thoro*; for they continue husband and wife. 1 *Sal.* 115. 1 *Rol.* 426.

So, if the wife, after a divorce *à mensâ & thoro*, or before, sues another woman for incontinency with her husband, and recovers costs against her, the husband may release them; and if the wife afterwards proceed for them in the spiritual court, a prohibition shall go. *R. 1 Sal.* 115. 5 *Mod.* 70.

But if upon a divorce *à mensâ & thoro*, the wife be allowed alimony, and afterwards sues in the spiritual court for injury or defamation, and costs are recovered, the husband cannot release them; for they come in lieu of what she spent out of her alimony, or separate maintenance. *R. 1 Sal.* 115. 5 *Mod.* 71. *R. 1 Rol.* 426.

[If the wife squanders his estate, or goes into lewd company, he may

may deprive her of liberty ; otherwise, not. *Rex v. Lister*, M. 8 G. Str. 478.]

[If the husband executes articles of separation, and covenants not to disturb her, &c. it is a renunciation of his marital right to seize her or to force her to live with him, and an attempt to seize her by force would be a breach of the peace ; if he brings *habeas corpus*, and attempts to molest her on her return from the court, it is a contempt. *Rex v. Mead*, (*John Wilkes's Case*), P. 31 G. 2. 1 B. M. 542.]

(P) What Acts a *Feme-Covert* may do without her Husband.

(P 1.) Alien her Estate, &c.

IF a *feme-covert* levy a fine of her lands, without her husband, this bars him and his heirs, if it be not avoided by her husband. 10 Co. 43. a. 1 Rol. 346. l. 50. 1 Leo. 82. Adm. Jon. 138.

So, if she suffer a common recovery, it is a bar, till it be avoided. Dub. 1 Rol. 347. l. 1.

So, if an estate be given to a *feme-covert*, upon condition that she enfeoff another, she, for the saving of the condition, may make a feoffment to the other during coverture. Jon. 137, 138.

So, if she has power to dispose, she may execute her power by conveyance. Jon. 137.

[An estate in fee was devised to a *feme-covert* with a power to dispose of the same without the control of her husband ; it was holden that such a power was void, as being inconsistent with the fee given her in the first instance, and that she could not convey without fine. *Goodill v. Brigham*, C. P. H. 38 G. 3. 1 Bos. & Pull. Rep. 192.]

[And the general rule is, that a *feme-covert* acting with respect to her separate property, is competent act in all respects as if she were a *feme-sole*. 2 Vesey, 190. 1 Brown. Ch. Rep. 20.]

[And therefore where, upon a bill being brought by husband and wife for an account, the wife, together with her husband, submitted that the profits of her separate estate should be applied to pay the husband's debts ; she was bound by the submission, and the profits of her separate estate were by decree directed to be so applied. 1 Vesey, 163. 1 Brown. Ch. Rep. 20.]

[So, where the wife being authorised by settlement to dispose of her separate estate contracted to sell it, the court bound her to a specific performance of that contract. 1 Vesey, 517. 1 Brown. Ch. Rep. 20.]

[So, the bond of a *feme-covert* jointly with her husband shall bind her separate estate. 1 Brown. Ch. Rep. 16. 2 Vesey, 190.]

[So, where a woman before marriage becomes bound for the payment of a sum of money, and on her marriage, separate property is settled on her, if the obligee can have no remedy against the husband, the wife's separate property is bound. 1 Brown. Ch. Rep. 17. in the notes.]

[But the obligee must first endeavour to recover against the husband by suing him. *Id. ibid.*]

[If a *feme-covert* levies a fine of her lands, it is good against her heirs by eloppel. *Taylor v. Philips*, P. 1749, 1 Vesey, 229.]

[Whether

[Whether *feme-covert* can surrender her copyhold without her husband's joining, but in his presence. *Dub. 1 Vesey*, 229.]

But if a *feme-covert* grant a rent-charge, without assent of her husband out of her lands, it will be totally void. *Perk. Grant*, 6. *Vide post. (Q)*.

So, if she grant an annuity by deed. *Perk. Grant*, 6.

Tho' the rent-charge be granted out of land assigned to the wife by the husband, for her several maintenance. *Perk. Grant*, 8.

So, a feoffment by a *feme-covert* without her husband, is void; for she cannot make livery. *Adm. Jon.* 138. *Latch*, 41.

Tho' it be in execution of a trust; for it ought to be done by her and her husband. *Jon.* 137, 8. *Semb. cont.* by the other Judges in the case of a trust. *Jon.* 137, 8. *Latch*, 40.

[A *feme-covert* having a separate land estate, sets workmen to work in her husband's house, and promises to pay them; her lands shall be subject. *Semb. sed qu. Clark v. Miller*, T. 1742, 2 *Atkyns*, 379.]

(P 2.) Accept an Estate.

So, if a *feme-covert* purchase lands without the consent of her husband, the conveyance is good, till it be avoided by her husband. *Co. L. 3. a.*

And therefore, if a feoffment, or demise for life, &c. with livery, be made to a *feme-covert* without her husband, the estate is vested in the wife before the agreement of the husband. *Co. L. 356. b.*

[Hence, in covenant for rent against an *assignee*, an assignment over before the rent accrued, is a good *plea*, tho' the plaintiff *reply* that the *assignee* over is a *feme-covert*. *Doug.* 452.

So, if a *feme-covert* make an actual entry by wrong, it will be a *disseisin*, and the estate vests in her. 1 *Rol.* 660. l. 33. *Co. L. 357. b.* *Vide post. (Q)*.

But the husband by his disagreement divests the whole estate out of his wife. *Co. L. 3. a.*

So, if the husband alien the land of his wife, and the alienee afterwards make a gift, or demise to the husband and his wife for life; the wife shall be in her remitter to the whole. *Lit. f.* 666. *Vide in Remitter*, (A 4.)

Tho' the demise was by fine *surrender*, or by indenture. *Co. L. 353. a.*

So, if the husband and wife were jointly seised, and the husband aliens, and the alienee makes a demise to them, it shall be a remitter to both of them. *Lit. f.* 672.

If there be a feoffment by a woman, upon condition to re-ensfeoff when she pleases; after coverture she may require the feoffment without her husband, and if the feoffee does not perform the condition, it will be broken. 1 *Rol.* 346. l. 30.

(P 3.) Execute an Authority, &c.

So, a *feme-covert* may act *en auter droit*, without her husband: as, if she be an executrix, she may administer without the assent of the husband. *Perk. Grant*, 7. *Vide in Administration (D)*.

If she has an authority to sell, &c. she may do it without her husband. *Co. L.* 112. a. 1 *Rol.* 329. l. 26.

So, if there be a devise to a *feme-covert*, with a power to dispose to any of her sons, she may, by feoffment, &c. dispose the inheritance to her son, without the husband. *R. Jon. 137, 8. Latch, 139.*

So, if there be a devise to the wife in fee, upon condition that she dispose. *R. Jon. 137, 8. Latch, 139.*

But a devise to the wife in fee, upon trust to convey to another; if she conveys by feoffment without her husband, it will be void. *Dub. Jon. 138.*

So, the queen consort may grant and take, sue and be sued, without the king. *Co. L. 133. a. Vide in Roy, (F 1.)*

So, by the custom of London, a *feme-covert* may be a sole trader. *Sbo. 124. Vide ante, (A 2.)*

So, a disposition by the wife, pursuant to an agreement by the husband before coverture, will be good. *Vide in Chancery, (2 M 11. 14.)*

(Q) What not.

Cannot make a Contract, &c.

BUT generally, a *feme-covert* has no power to make a contract without her husband: and therefore, such contract is absolutely void. *R. by all the Judges, 1 Sid. 120.*

And if the wife sell or dispose of the money or goods of the husband without his assent, the sale is void, and the husband may have *trover*, &c. for the goods.

[Cannot indorse a promissory note made to her. *Conner v. Martin, P. 8 G. Str. 516.*]

So, if a wife loses at cards, &c. the husband may maintain *trover* for the money. *R. 1 Sid. 122.*

So, if a wife buy goods, &c. without the assent of her husband, the husband is not chargeable for them. *Per three J. 4 Leo. 42.*

Tho' they were for necessary diet, or apparel: as, bread, &c.

And he is not chargeable in *trover*, or account any more than in *assumpsit*. *1 Rol. 346. M. R. 1 Sid. 129.*

So, if a wife buys necessaries, but pawns them before using. *1 Sal. 118.*

So, if a wife be arrested and committed to prison, the husband shall not be charged for her diet, or lodging there, if he never assents that she shall have it. *R. 2 Lev. 16.*

Yet, if the goods come to the use of the husband, this is a proof of his assent, and he shall be charged.

[And *assumpsit* lies against husband for money lent to the wife at his request. *Stephenson v. Hardy, H. 13 G. 3. 3 Wils. 388.*]

So, if goods come to the use of the wife, or the children, or family of the husband, and his assent precedent or subsequent be proved, he shall be charged. *1 Rol. 350. E. R. by all the Judges. 1 Sid. 120.*

So, if they come to the house of the husband, and are used there, it is good evidence to charge the husband without more. *R. 1 Sid. 121. 126. Per Treby, Skin. 349.*

So, if the wife be generally allowed by the husband to be house-keeper, or to buy for him; her contract charges the husband. *R. 1 Sid. 128.*

So, if a wife buy necessary apparel for herself, the assent of the husband

husband shall generally be intended. 1 *Rol.* 351. l. 5. 1 *Sal.* 118. R. 1 *Brownl.* 47.

Or, if the wife trades in goods, and buys for her trade when she cohabits with her husband. 1 *Sal.* 113.

Or, if she buys necessaries, when her husband is beyond sea. R. 1 *Sid.* 127.

Or, when the husband turns her out of his house. 1 *Sal.* 118, 119. Before notice not to give her credit. *Per Holt, Skin.* 323. *Mod. Ca.* 171.

Or, when she departs from her husband, if he afterwards receives her. 1 *Sal.* 119. *Mod. Ca.* 171.

But where the husband countermands the power to his wife, her contract afterwards does not charge him. 1 *Sid.* 129.

So, if he prohibits a particular person to sell to her. R. 1 *Sid.* 127, 8. 1 *Lev.* 5.

[If husband turns away his wife without cause, and refuses to provide for her, he cannot prohibit any body to trust her. *Bolton v. Prentice, M.* 18 G. 2. *Str.* 1214.]

So, if the wife elope or depart, and do not cohabit with her husband, her contract for necessaries does not charge her husband. R. 1 *Sid.* 129. *Skin.* 323. *Mod. Ca.* 171. 1 *Sal.* 118, 119.

[If she elopes with an adulterer, the husband is not chargeable for necessaries, though plaintiff had no notice. *Morris v. Martin, M.* 12 G. *Str.* 647. *Manwairing v. Sands, T.* 12 G. *Str.* 706.]

[Neither is he chargeable in the case, where he had himself been first guilty of adultery, and turned her out of doors without any imputation upon her conduct. *Govier v. Hancock, B. R. E.* 36 G. 3. 6 *T. R.* 603.]

[The question in these cases is, Whether the necessaries were found before or after the wife's adultery? In the first case the husband is liable; in the latter he is not. *Ibid.*]

[Defendant's wife, having committed adultery, he left her in his house, with two children bearing his name, but without making any provision for her in consequence of the separation; she continued in a state of adultery; and it was holden that the husband should be liable for necessaries furnished to her. *Norton v. Fazan, C. P. E.* 38 G. 3. 1 *Bos. & Pull. Rep.* 226.]

[*Quere*, Would the husband have been liable if the plaintiff, furnishing the articles, had been acquainted with the wife's situation? *Ibid.*]

[If a wife elopes, tho' not in an adulterous manner, the husband is not bound. *Child v. Hardyman, T.* 4 G. 2. *Str.* 875.]

[Unless he refuses to receive her again. *Ibid.*]

[But if he does not absolutely refuse, but only says she shall not sit at the table, but live in a garret, when by her bad behaviour she had deserved no better usage, he is not bound. *Ibid.*]

[If the wife is in execution for a crime, and an alehouse-keeper within the rules receives her and finds her necessaries, the husband shall not be charged; for her being there was illegal. *Fowles v. Dingley, M.* 13 G. 2. *Str.* 1122.]

So, if she does not cohabit, and has a separate allowance, and this be notorious, tho' no special notice be given to the plaintiff of it. R. 1 *Sal.* 116.

[But tho' a woman has a pension from the crown during pleasure, yet is the husband liable to action for necessaries furnished her. *Thompson v. Hervey*, H. 8 G. 3. 1 B. M. 2177.]

So, if the wife has a notorious contest with the husband for maintenance, by a public suit, the husband shall not be charged for vestments bought by the wife afterwards. *Per Treby*, *Skin.* 349.

So, if the vestments bought are apparently beyond the quality of the husband. *Per Treby*, *Skin.* 349.

So, if a wife, who cohabits with her husband, buys vestments without any necessity, of any one warned by the husband not to trust her. 1 *Sal.* 118.

And if the servant or apprentice be warned, it is sufficient. R. 1 *Sal.* 118.

So, if the wife, after departure from her husband, earn her diet by her labour; the husband shall not be charged for the diet. R. 1 *Sal.* 118.

So, a *feme-covert* cannot be a disseisor; for if the husband makes a disseisin, to the use of his wife, and she assents, her agreement is void, and it will be the disseisin of the husband alone. 1 *Rol.* 660. l. 5. 10, &c.

So, if husband and wife make a disseisin, it is the act of the husband. 1 *Rol.* 665. l. 37.

So, if a stranger make a disseisin to the use of a *feme-covert*, and she assent, her agreement is void. 1 *Rol.* 660. l. 15.

So, if a *feme-covert* enter, and make a disseisin to the use of her husband, or of a stranger, he is not a disseisor; for the wife cannot dispose of the use to another. 1 *Rol.* 660. l. 50. 661. l. 1.

So, no consent or agreement of the wife to a disseisin precedent, or subsequent, can make a *feme-covert* disseisors. Co. L. 357. b.

Yet, by an actual entry, and the proper act of the wife, she may be a disseisors. Co. L. 357. b.

[Equity will not make good against a wife a contract, on which she cannot be sued at law. *Semb.* 2 *Ves. jun.* 156.]

(R) What Acts of the Husband the Wife may waive after his Death.

IF the husband alone make a feoffment, gift in tail, or demise for life of his wife's lands, she or her heirs may avoid it by entry after his death. *Vide ante* (K).

So, if he levy a fine, or suffer a common recovery of his wife's land. *Vide ante* (K).

So, if the husband and wife join in an alienation of the wife's land; unless it be by fine or recovery. *Vide ante* (K).

So, if they join in an alienation of land, of which they are joint-tenants. *Vide ante* (K).

So, if the husband alone, or with his wife, demise for life, or for years, the freehold of the wife, where it is not warranted by the statute 32 H. 8. 28., the wife, after the death of her husband, may waive it. *Vide* 1 *Leo.* 192. *Vide ante*, (G 3.)

So, if the husband seised for life in right of his wife, or jointly with his wife, commit a forfeiture, the wife, after the death of her husband, may avoid it. 1 *Rol.* 851. l. 52.

So, if a feoffment, gift, or demise be made to husband and wife, the wife may waive it after the death of her husband.

Tho' the estate be conveyed to them by fine.

So, if an estate be conveyed to the wife, and the husband assent to it, the wife after his death may waive it. *Co. L. 3. a.*

So, the heir of the wife, if she die before agreement or disagreement to the estate. *Ibid.*

So, if a term for years be granted to husband and wife, she may waive it after the death of her husband. *1 Rol. 349. l. 22.*

So, if an obligation or recognizance be made to husband and wife, she may waive it after the death of her husband, and it will be an obligation to the husband alone. *1 Rol. 349. l. 5.*

If the wife waives an estate made by them during the coverture, it will be the grant or demise of the husband alone *ab initio*; for her waiver avoids the estate *ab initio*. *Sav. 112. 3 Co. 27, 8.*

So, if she waives an estate made to them.

(S 1.) What she may affirm by her Agreement.

BUT if husband and wife make a demise for life, or for years, not warranted by the *ft. 32 H. 8. 28.* of the land of the wife, by her agreement to the lease after the death of her husband, it shall be good. *1 Rol. 349. l. 10, 11.*

And by such agreement to the lease, she shall have the rent reserved. *1 Rol. 349. l. 10.*

And the arrearages incurred in the life of her husband.

And she may have waste, for waste in the life of her husband. *Sav. 111.*

[And a re-delivery by the wife after the death of her husband of a deed delivered by her during the coverture is a sufficient confirmation of such deed, so as to bind her without its being re-executed or re-attested. *Covp. 201.*]

[And circumstances alone may be equivalent to such re-delivery, tho' the deed be a joint-deed by *baron and feme*, affecting the wife's land, and no fine levied. *Id. ibid.*]

So, a wife, after the death of her husband, may agree to an estate made to her and her husband during the coverture.

(S 2.) The Effect of her Agreement.

If the wife agree to an estate made to her during the coverture, she shall be liable to all charges to which the estate is subject: as, if the estate was granted by fine, with a render of a rent, she shall be chargeable with the rent. *1 Rol. 349. l. 17.*

So, if there be a demise to husband and wife, rendring rent, if the wife agree to the demise, she must pay the rent. *Ibid.*

So, she shall be chargeable with the arrearages incurred during the coverture. *1 Rol. 349. l. 20.*

So, she shall be charged for waste during the coverture. *2 Inst. 303. 2 Rol. 827. l. 10. 25.*

If the estate be granted upon condition, the wife shall be subject to the condition. *Dy. 13. b.*

So, to the covenant of a lease. *Dub. Dy. 13. b.*

(S 3.) What shall be an Agreement.

If the wife accept rent, reserved upon a lease by her and her husband, after the death of her husband, that amounts to an agreement to the lease.

[By a marriage-settlement, an estate was settled to the use of the wife for life, remainder to such persons and for such estates as she should by deed or will attested by three witnesses appoint, and for want of such appointment reversion to herself in fee; during her husband's life she made a will pursuant to the power devising the estate to *A.* in fee; after which she and her husband executed a lease of part of the settled estate to the defendant, not executed pursuant to the power, and after her husband's death she received rent from the defendant: it was holden, that such lease was voidable only by her upon her husband's death, and that her receipt of rent accruing afterwards was a confirmation of it against *A.*, who claimed under her appointment by the will. *Collins v. Willer*, *B. R. H.* 38 *G.* 3. 7 *T. R.* 478.]

If the wife enter and take the profits, that amounts to her agreement to the estate made to her during coverture. 3 *Co.* 26. *a.*

[If *A.*, by bond previous to marriage with *B.*, agrees to settle *B.*'s estate to the use of her and the children of the marriage, and then to *A.*'s right heirs, but *B.* is not an executing party: during the marriage, real estate descends to *B.*; *A.* makes his will, reciting the bond, and devises this estate back to *B.*, and gives her all his estate, real and personal, and makes her executrix; she proves the will, and possesses herself of all his estate: by so doing, she agrees to the settlement in the bond mentioned, and after her death it shall go to the children of that marriage. *Archer v. Pope*, *T.* 1754, 2 *Ves.* 523.]

If the wife, after the death of her husband, take a second husband, who accepts rent reserved upon a lease by his wife with her husband, that affirms the lease against the wife for the whole term; for her assent is devolved to the second husband. *Per three J. Dy.* 159. *a.* 1 *Rel.* 475. *l.* 12.

(S 4.) What shall be a Waiver.

If the wife, after the death of her husband, bring a writ of dower, it shall be a waiver of the estate, limited to her after marriage for her jointure. 3 *Co.* 27. *a.*

Tho' she brings dower only for a third part of the residue, and not of all the lands of the husband. 4 *Co.* 5. *b.*

Tho' she had secretly entred before dower brought; for after a recovery in dower she shall be estopped to say, that she had an estate assigned for a jointure. *R.* 4 *Co.* 5.

So, since the *st.* 27 *H.* 8. 10. the wife may waive her jointure made after marriage, by *parol in pais*, and accept her dower by assignment *in pais*. 3 *Co.* 27. *a.*

[But by *f.* 6. of the same statute, she cannot waive her jointure, made before marriage, unless she be evicted from it or any part of it, without fraud or covin; and in such case, by *f.* 7. she may be endowed of as much of the residue of her husband's tenements or hereditaments, whereof she was before dowable, as the same lands and tenements so evicted and expelled shall amount to.]

So,

So, at the common law, an use might have been waived by *parol*.
3 Co. 27. a.

(S 5.) What not.

But by the common law, an estate of freehold could not be waived by bare *parol in pais*. R. 3 Co. 26. a.

Nor, generally, an estate since the *ft.* 27 H. 8. 10. where the possession is executed to the use. R. 3 Co. 27. a.

(S 6.) The Effect of her Waiver.

If husband and wife make a lease, and after the death of her husband the wife enters, it cannot now be pleaded, that the husband and wife *dimiserunt*. 1 Leo. 192. *Vide ante*, (G 3.)

(T) What Estate the Wife cannot waive.

BUT if the estate of a *feme-covert* be discontinued, and a feoffment, &c. is made to her only, whereby she will be remitted, she cannot waive the feoffment after the death of her husband. Co. L. 357. a.

So, if the discontinuee of the husband grant the estate to the husband for life, remainder to the wife: the wife cannot waive the remainder after the death of her husband, for she was immediately remitted. Co. L. 358. b.

So, if there be a feoffment to the husband and wife in tail, remainder to A.; the husband discontinues, and takes back an estate to him and his wife in tail, remainder to B.; tho' the wife, in respect of herself, may take which she pleases, both the estates being after marriage, yet she ought to take the first, which was for the benefit of A. in the remainder. Hob. 255. 71.

Yet, when both estates are waiveable by a wife, without prejudice to a third person, she may waive which she pleases, tho' one would make her a more beneficial estate than the other: as, if there be a feoffment to husband and wife and their heirs, the husband discontinues, and takes back an estate to him and his wife, and the heirs of their two bodies; she may waive which estate she pleases. Co. L. 357. a.

So, if there be a gift to husband and wife, and the heirs of their bodies; the husband alone levies a fine, and devises to the wife for life; she may waive the estate-tail, or the devise; for all others, who have interest, are barred by the fine. Dy. 351. b. *in marg.*

(V) In what Actions Husband and Wife ought to join.

IN all actions real for the lands of the wife, the husband and wife ought to join. R. 1 Bul. 21.

So, in a right of ward. Ow. 83.

So, in actions personal, for a *chose in action*, due to the wife before coverture, they ought to join: as, in debt upon a bond, or specialty made to the wife before coverture. 1 Rol. 347. l. 53. D. Ow. 82. Cro. El. 537.

[Where a bond-debt is due to the wife, the husband may sue alone without joining his wife. Per Ld. Hardwicke C. Oglander v.

Baston, 1 *Vern.* 396. *Howell v. Maine*, 3 *Lev.* 403. *Clerk v. Ld. Angier*, 1 *Eq. Caf.* 64. 1 *Ch. Caf.* 41. *S. C.* 3 *T. R.* 631. *contra. Vide Com.* 32.]

So, debt for rent, upon a lease for years, due before the coverture. *Cro. El.* 700.

Or, upon a lease for life. 1 *Rol.* 348. *l.* 8.

So, in an avowry for rent upon a lease for life, or years, before coverture. 1 *Rol.* 348. *l.* 8. 347. *l.* 50.

So, in debt for rent upon a lease at will by the wife, before coverture. *Co. L.* 55. *b.*

So, in trover, upon a conversion of the goods of the wife before coverture.

In *assumpsit*, upon a promise to the wife before coverture. 1 *Sid.* 25.

Or, for the labour of the wife *dum sola*.

In an action upon the case for stopping a way to the wife's close, before marriage. *R. Cro. Car.* 419.

So, in debt for arrearages upon an account, found before auditors assigned by the husband and wife to the receiver of the wife. 1 *Rol.* 348. *l.* 5.

So, they ought to join in actions, which arise during the coverture, if the wife might have an action for the same cause, if she survive.

As, in *detinue* of charters of the wife's inheritance. 1 *Rol.* 347. *l.* 49.

In *trover*, for a deed of rent-charge granted to the wife *dum sola*, tho' it was lost after the coverture.

In an action upon the *st.* 8 *H. 6.* for a forcible entry or detainer. *Mo.* 5.

In covenant as assignees of *B.*, upon a covenant to make an assurance to *B.*, his heirs and assigns. *R.* 1 *Rol.* 348. *l.* 25. *Jou.* 406, 7.

Or, upon other covenant as assignees, where the assignment is to both. *R. Cro. Car.* 505.

[If *feme covert* has a mill, and one agrees with husband and wife to grind all his corn at his mill, under penalty to be paid by offender to offended; they must join, for the action would survive to her. *Dunstan v. Burwell*, *T.* 21 & 22 *G. 2.* 1 *Wilf.* 224.]

[In trespass for treading down the grass of the inheritance of the wife. *Willy v. Thompson*, *M.* 1729, *Bunb.* 277.]

[If it be referred to a master in Chancery to take an account of what is due to husband and wife, who reports the sum due, and appoints it to be paid to the husband, and the defendant is committed for non-payment, and escapes; the husband and wife may join in an action against the warden. *Huggins v. Durham*, *M.* 13 *G. Str.* 726.]

[The husbands should be joined in an action, to assert the right and interest of their wives; as, the dippers at *Tunbridge Wells* against one who disturbs them in their employment. *Weller v. Baker*, *T.* 9 *G. 3.* 2 *Wilf.* 414.]

So, the husband and wife ought to join in waste, upon a lease for years by the husband and wife, seized in right of his wife. *Sav.* 111.

So, for a personal wrong to the wife, the husband and wife ought to

to join: as, for a battery of the wife. *R. Yel. 89. 1 Brownl. 205. 1 Rol. 360. 2 Cro. 501. 538. Adm. Cro. Car. 90.*

[But a wife living away from her husband, and married to another man, may sue alone and recover, in trespass for an assault. *Westbrook v. Strutville, H. 4 G. Str. 79.*]

Or, false imprisonment of the wife. *1 Sal. 119. Semb. Lane,*

53, 4.

Tho' a thing be added by way of aggravation, which goes only to the damage of the husband: as, if it be added, *quod negotia* of the husband, *&c. infecta remanserunt. R. 1 Sal. 119.*

In an action upon the case, for maliciously indicting of his wife. *Jon. 440. Vide post. (X).*

So, in an action for a thing due to the wife, *en auter droit*, they ought to join: as, if they sue for a debt, *&c.* to the wife as executrix, or administratrix.

So, if a debt to the wife's testator be paid to *A.* for the wife, without an express direction of the husband, they ought to join in an action against *A.*, and the husband alone cannot sue for money received to his use. *R. 1 Sal. 282.*

(W) In what, the Husband shall sue alone.

BUT where the wife cannot have an action for the same cause, if she survive her husband, the action shall be by the husband alone.

As, in an *indebitatus assumpsit* for the labour, *&c.* of the wife during the coverture. *R. 4 Mod. 156. R. 1 Sal. 114.*

In an *indebitatus assumpsit*, upon any promise to the wife after coverture. *R. cont. 2 Cro. 77. 205. 1 Sid. 25. Vide post. (X).*

In an *assumpsit* to the husband, in consideration of forbearance, *&c.* to pay a debt due to the wife before the coverture. *Per two J. Yel. cont. 2 Cro. 110. Vide infra.*

So, in an action upon the case for disturbing him in his common, which he has in right of his wife. *R. 2 Bul. 14. Vide post. (X).*

In an action upon the case for words spoken of the wife, by which the husband has a special damage. *1 Sal. 206. R. 1 Lev. 140. 1 Sid. 346.*

In an action upon the case for a battery of the wife, *per quod consortium amisit.* *R. 2 Cro. 501, 502. Jon. 440. 2 Rol. 556. l. 40. R. 2 Rol. 51.*

Or, for carrying away the wife, *per quod, &c.* *R. 2 Cro. 538. R. Cro. Car. 90.*

[No action for *crim. con.* can be brought for any act of adultery after a separation between husband and wife. *Weedon v. Timbrell, B. R. T. 33 Geo. 3. 5 T. R. 357.*]

[For malicious prosecution of his wife, *per quod* they both were scandalized, and he put to expence, *Smith v. Hixon, T. 7 G. 2. Str. 977. B. R. H. 54.*]

[In trespass by the husband for breaking and entering his house, and beating his wife; the breaking and entering the house is the cause of action, and the beating the wife is well joined in the declaration to aggravate damages. *Dix v. Brookes, T. 3 G. Str. 61.*]

[In trespass by husband for entering his house and keeping him out,

out, and taking his goods to the value, &c. *nec non de eo quod* he assaulted and beat his wife, and took her goods to the value, &c. *ad damn.* 100 *l.*, and 100 *l.* damages given, held good. *Read v. Marshall, H. 8 G. Fort.* 377.]

In debt upon a bond made to the wife after the coverture. *R. 3 Lev.* 403. *D. Litt.* 13. [4 *T. R.* 616.] *Vide post.* (X).

In covenant to husband and wife, by indenture between them of the one part, and *A.* of the other part; and may declare upon a covenant to himself. *R. 2 Mod.* 217.

So, in trespass, for a trespass done upon his wife's land during the coverture. *1 Rol.* 347. *l.* 40. *R. 1 Bul.* 21. *Jon.* 376.

In trespass for taking charters of his wife's inheritance. *1 Rol.* 347. *l.* 32.

In forging of false deeds of his wife's inheritance. *1 Rol.* 347. *l.* 34.

In a ravishment of a ward. *Ow.* 82, 83.

In an action upon the *st.* 5 *R.* 2. for entry into the wife's land. *1 Rol.* 347. *l.* 27. *Vide post.* (X).

In *trover*, &c. for tythes severed from the nine parts, which belong to the wife's rectory. *Jon.* 325.

So, in a *quare impedit*, upon an avoidance during the coverture. *1 Rol.* 347. *l.* 30. *Per Dyer, Ow.* 82. *Co. L.* 351. *a.* *Per two J.* *Lit.* 13. *Dub. Lit.* 374. *Acc.* *1 Brownl.* 159. *2 Bul.* 14.

Or, in a *darrein presentment*. *Cont.* *1 Brownl.* 159.

So, in debt for rent, upon a lease by the husband and wife after the term expires. *R. 8 Bul.* 234. *R. 1 Bul.* 21.

So, in debt for rent incurred during the coverture, upon a demise by the husband of land which he has in right of his wife, tho' the term continues. *Vide post.* (X).

So, if the demise was by the husband and wife. *Semb.* *2 Bul.* 234. *Per Yel. acc. Fleming cont.* *1 Bul.* 21. *Acc. Litt.* 13.

So, if the reversion after a lease made, was granted to husband and wife. *R. 2 Bul.* 234.

So, an *assumpsit* lies by the husband alone, upon a promise to him, in consideration of forbearance, to pay a debt due to his wife as executrix. *R. 1 Sal.* 117. *Carth.* 462. *Vide supra.*

In an action upon the case for maliciously indicting husband and wife; for the wife ought not to join for indicting her husband. *Jon.* 440.

(X) In what the Husband may sue alone, or join with his Wife.

YET in actions for a profit accrued during the coverture to the husband in right of his wife, the husband may sue alone, or join with his wife: as, in a *valore maritagii* accrued during the coverture. *R. Ow.* 82, 83. that it lies by the husband alone.

But it is more sure by the husband and wife. *Ow.* 83.

So, an avowry for rent of land, which the husband has in right of his wife, incurred during the coverture, ought to be by the husband and wife. *1 Rol.* 318. *l.* 30. 347. *l.* 51. *Vide Win. Ent.* 952.

Or,

Or, it may be by husband alone. *Semb. 1 Rol. l. 318. l. 35. R. 2 Cro. 442. Per Twisd. 1 Mod. 273. Clift. Ent. 643, 4. Vide 2 Bro. Ent. 244.*

So, covenant against a lessee for years, for not repairing during the coverture, where the reversion is granted to husband and wife, may be by the husband alone. *R. 2 Cro. 399. 3 Bul. 164. 1 Rol.*

350. Or, by the husband and wife. *2 Cro. 399. 3 Bul. 164.*

So, an action upon the case against a lessee for years, for burning his house, where the husband has it for the life of his wife, may be by the husband alone. *Dub. Cro. El. 461, 2.*

Or, by the husband and wife.

So, an action upon the case for cutting down trees, the lops of which were reserved to the wife for her life, may be by the husband alone. *Semb. Cro. Car. 438. Vide infra.*

Or, by the husband and wife. *R. Cro. Car. 438.*

So, in debt upon the *ft.* *2 Ed. 6. 13.* for not setting out tythes upon the land, which the husband has in right of his wife, they may join. *R. Cro. El. 608. 613. R. 1 Jon. 325. R. Mo. 912.*

Or, the husband alone may sue. *Jenk.*

So, in action for a *tort* which prejudices a remedy by husband and wife, the husband may sue alone, or they may join: as, in *refcous* for a distress of a rent-charge due before the coverture, the husband alone may sue; for it is a wrong to him. *R. Cro. El. 459. Mo. 422.*

Or, they may join. *R. Cro. El. 459. Mo. 422.*

So, in an action for champerty, or maintenance in a suit against the husband and wife, the husband alone shall sue. *2 Inst. 563.*

Or, they may join. *Ibid.*

So, in a *decies tantum* for embracery in an assise against husband and wife. *Rol. 447. l. 42.*

So, there may be a *scire facias* by the husband alone, upon a judgment for damages by the husband and wife. *3 Lev. 403.*

So, if the cause of action be only commenced before coverture, and completed afterwards, the husband alone may sue, or the husband and wife may join: as, in *trover*, where the goods were lost before marriage, and the conversion was after, they may join. *1 Sid. 172. 1 Vent. 261. 2 Lev. 107.*

Or, the husband may sue alone. *Per Hale, 1 Vent. 261. 2 Lev. 107. Per two J. 1 Sid. 172.*

So, if a woman lease for years, rendring rent, and afterwards marry, the husband and wife may sue for rent due after the coverture; or the husband alone shall have debt for it. *Pal. 207.*

So, where the wife is the meritorious cause of action, the husband alone may sue, or the husband and wife may join, tho' damages only are recovered: as, in *assumpsit* to the wife after coverture for a cure, the husband and wife may join. *R. 2 Cro. 77. 205. 1 Sid. 25. R. 1 Sal. 114. Per Dodr. 2 Rol. 250.*

Or, the husband alone may sue, *Semb. 2 Cro. 77. 205. Per Glin, 2 Sid. 123. Vide ante (W).*

[In an action of covenant, for non-payment of rent of land, the inheritance of the wife, they may or may not join, at their election. *Aleberry v. Walby, M. 6 G. Str. 229.*]

So,

So, upon a promise to pay 8 *l. per annum* to the husband and wife during coverture, they may join.

Or, the husband alone may sue.

So, upon a bond to the husband and wife after coverture, or to a *feme-covert* by herself, they may join. *Lit. f. 13. Semb. 1 Ver. 396. [Supra, p. 103.]*

Or, the husband alone may sue. *2 Mod. 217. 1 Ver. 396. Lit. f. 13. Vide ante (W).*

[If a bond be given to husband and wife administratrix, the husband alone may declare on it, as on a bond made to himself. *Ankerstein v. Clarke, B. R. E. 32 Geo. 3. 4 T. R. 616.*]

So, if there be an award to pay so much to the husband, and so much to his wife, they may join for the money awarded to the wife.

Or, the husband alone may sue. *Lit. f. 13.*

So, in an action for a *tort* during the coverture, if it may be to the damage of the wife, if she survive, as well as of the husband, they may join, or the husband shall sue alone: as, in trespass for cutting down trees upon the land of the wife, the husband and wife may join. *Vide supra. Vide 1 Rol. 348. l. 18.*

Or, the husband alone may sue. *Adm. 2 Vent. 195.*

In an action upon the *st. 5 R. 2.* for entry into the wife's land, they may join. *1 Rol. 348. l. 20.*

Or, the husband alone may sue. *1 Rol. 347. l. 28. Vide ante (W).*

So, in an action upon the case for stopping a way to the land of the wife, they may join. *R. Cro. Car. 419.*

Or, for inclosing land in which the wife has a common.

Or, for not grinding at his wife's mill.

Or, in these cases of stopping the way, inclosing the common, or not grinding at the mill, the husband alone may sue. *Vide ante (W).*

So, in a *clausum fregit* upon the wife's land, they may join. *Dub. 2 Vent. 195.*

Or, the husband may sue alone. *2 Vent. 194.*

So, for a wrong founded upon one intire record against both, they may join, or the husband alone shall sue: as, in an action upon the case in nature of a conspiracy, for maliciously indicting husband and wife, they may join. *Per Croke, Cro. Car. 553. Jon. 440.*

Or, the husband alone shall have it. *Semb. Cro. Car. 553.*

So, for a malicious presentment in the spiritual court. *Semb. 2 Cro. 355.*

(Y) What Actions shall be against Husband and Wife.

ACTIONS real, for the land of the wife, ought to be against the husband and wife.

So, debt for rent upon a lease for life, or years, made to husband and wife, shall be against both. *1 Rol. 348. l. 45. 50.*

So, an action for a *tort*, done by the wife after marriage, shall be against husband and wife: as, *trover*, upon a conversion by the act of the *feme-covert* only. *1 Rol. 6. l. 10. R. 1 Leo. 312.*

An action upon the case against husband and wife lies for retaining

ing his servant; for the reception of another servant into their custody, is a *tort*. *Semb. 2 Lev. 63.*

So, an action which charges the husband for an act of his wife, done before coverture, shall be against both: as, *trover*, upon a conversion by the wife before marriage. *Co. El. 351. b.*

Or, *detinue* for goods taken by the wife before the coverture. *Ibid.*

So, debt for rent, upon a lease at will to the wife *dum sola*. *Ibid.*

Or, upon a lease for years, where the rent incurred before coverture. *Mod. Int. 162. 175.*

[The husband cannot be sued alone for the debt of his wife contracted before marriage. *Robinson v. Hardy*, 1 *Keb.* 281. 440. *Drue v. Thorn*, *Aleyn*, 72. *Mitchinson v. Hewson*, *B. R. T.* 37 *Geo.* 3. 7 *T. R.* 348.]

But an action for a *tort*, done by the husband and wife jointly, shall be against the husband alone; for the whole shall be intended to be the act of the husband: as, *trover* of goods, and conversion to their use. *R. 1 Rol. 348. l. 37. R. Pal. 343. Vide in Pleader, (2 A 2.)*

So, an action upon an *assumpsit* by husband and wife, against both, is bad; for *quoad* the wife, the promise is void. *Pal. 313.*

Tho' it be for vestments bought by the wife. *R. 4 Leo. 42.*

So, debt lies against the husband alone, for rent incurred during the coverture, upon a lease to the wife *dum sola*. *Tho. Ent. 117.*

Or, upon a lease which the wife has as executrix or administratrix. *Tho. Ent. 117.*

If an action be brought by, or against husband and wife, where it ought to be by or against the husband alone, it will be error; or it may be moved in arrest of judgment.

So, if it be by husband and wife, for a matter in which they ought to join, and also for a matter for which the husband ought to sue alone. *Vide Action (G).*

So, if it be against husband and wife, for a battery by both, and the husband is found *not guilty*, the action fails; for the husband ought to be joined only for conformity. *R. Yel. 106. R. cont. 1 Vent. 93. R. acc. 1 Brownl. 209.*

But, if there be an action by husband and wife, for a battery of both, (which would be bad, for the wife cannot join for the battery of her husband,) and as to the husband, the defendant is found *not guilty*, it will be good. *Per Bridg. Hard. 166. R. 2 Vent. 29. 2 Cro. 665. Vide Action (G).*

So, if the damages are found several for the battery of the husband, and for the battery of the wife, and the husband release the damages for his own battery. *R. 1 Vent. 328.*

So, if there be an action by husband and wife for a battery of the wife, and taking the vestments or goods of the husband with her, and the defendant is found *not guilty* of taking the goods. *Cont. 1 Lev. 3. Vide Action (G).*

(Z) What Actions the Husband shall have by his surviving.

[If a *feme-covert* die, and the husband survive, he shall have an action for any thing incurred during the coverture; as, the husband shall

shall have debt after the wife's death, for rent incurred to the wife during coverture. 1 *Rol.* 352. l. 5.

So, if the wife had a manor, the husband, after her death, shall have debt for a relief, which fell during the coverture. 1 *Rol.* 352. l. 11.

So, he shall have a ravishment, or an ejection of a ward of which he was ousted in the life of his wife. 1 *Rol.* 352. l. 8.

So, if the wife has judgment *dum sola*, and thereupon the husband and wife sue out a *scire facias* and have judgment, but before execution the wife dies, the husband, who survives, shall have a *scire facias* upon it. *R.* 1 *Sal.* 116. *Skin.* 682.

So, the husband alone may have debt upon it. 3 *Mod.* 189.

So, by the *st.* 32 *H.* 8. if the wife has a rent-charge for life, which is in arrear before, and after the coverture, the husband surviving shall have debt for all the arrears. *R.* 1 *And.* 47.

But, if husband and wife recover a judgment in debt, in right of the wife, as executrix to *A.*, and the wife dies; the husband shall not have execution upon this judgment, tho' he be privy; for the debt belongs to the succeeding executor or administrator of *A.* *R.* 1 *Rol.* 889. l. 10.

(2 A) What the Wife, if she survives.

SO, if husband and wife recover in a real action, in right of the wife, and the husband dies, the wife shall have execution, and not the executor of the husband.

So, if they recover in a *quare impedit*, and the husband dies, the wife shall have the writ to the bishop, and execution for the damages. 1 *Rol.* 889. l. 50.

So, in an assise or other real action, if the husband and wife recover, and the husband dies; the wife shall have execution for the damages, as well as for the land. 1 *Rol.* 889. l. ult. 890. l. 3.

So, after a judgment by husband and wife, if the husband dies, the wife shall have an attain. 1 *Rol.* 889. l. 45.

And if she recovers, she shall have execution, tho' the damages were paid by the husband. *Ibid.*

So, the wife surviving, shall have trespass, for a trespass upon her land during the coverture. *R.* *Pal.* 313.

Or, for a trespass, part in the life of the husband, part afterwards. *Ibid.*]

(2 B) What Actions shall be against the Husband if he survives.

IF a woman, lessee for life, takes husband, and dies, the husband shall be charged for rent incurred during the coverture; for he takes the profits of the land out of which the rent issues. 1 *Rol.* 351. l. 35.

So, for rent incurred during the coverture, upon a lease for years. *R.* *Ray.* 6. 1 *Lev.* 25.

So, if the husband, after the death of his wife, undertakes to pay for goods sold to her as a *feme-sole* trader, he shall be charged; for he is entitled to administration to her. *R.* *cont. Sho.* 184.

So,

So, if the husband and wife, upon payment of a sum in gross, undertake to discharge an annuity to the wife, and the wife die, an *assumpsit* lies upon this promise against the husband surviving. *R. Pal.* 312, 313.

If there be judgment against husband and wife upon a bond of the wife, who dies before execution; the husband shall be charged. *Agr.* 1 *Sid.* 337. *Lut.* 671.

So, if there be judgment against an husband and wife, executrix or administratrix, upon a *devastavit* during the coverture, and the wife dies, the husband shall be charged. *Cro. Car.* 519. *R.* 1 *Sid.* 337.

If there be judgment against the wife *dum sola*, and a *scire facias* upon it against husband and wife, and judgment, but before execution the wife dies, yet a *scire facias* afterwards lies against the husband who survives. *R.* 3 *Mod.* 186. 1 *Sal.* 116. *Lut.* 671. *Carth.* 30.

(2 C) What not.

BUT the husband shall not be charged after the death of his wife, for a debt due from the wife before coverture; for it was only in action. 1 *Rol.* 351. l. 40.

So, tho' there was judgment against a woman *dum sola*, who afterwards takes husband, and dies, the husband shall not be charged upon this judgment. *Agr.* 3 *Mod.* 186.

So, if there be judgment against an husband and wife, as executrix, *ut de bonis testatoris*, and upon a *fieri facias* thereupon, the sheriff returns a *devastavit*, and the wife dies before judgment against them *de bonis propriis*, the husband shall not be charged. *Dub.* 1 *Rol.* 351. l. ult. *Semb.* 3 *Mod.* 189.

So, if a *feme* executrix or administratrix takes husband, and they commit a *devastavit*, but the wife dies before judgment against them, the husband shall not be charged. *Cro. Car.* 519. 2 *Ver.* 118. *Vide Chancery*, (2 M 8.)

So, if the husband of a lessee for life does waste, and the wife dies before a recovery against them, the husband shall not be charged. 1 *Rol.* 351. l. 41. *D. Lut.* 674.

So, if there be judgment against husband and wife as executrix, and the wife dies, debt does not lie against the husband upon a suggestion, that he converted the goods of the testator to his own proper use. *R. Lut.* 674.

So, if there be a decree in equity against an husband and wife executrix, to be paid out of the assets of the testator, and the wife dies, there shall be no execution against the husband, without reviving against the administrator *de bonis non*, &c. 2 *Ver.* 195.

(2 D) Pleading by Husband and Wife.

HOW husband and wife ought to plead in an action by or against them, *vide in Pleader*, (2 A 1, &c.)

If husband and wife are seised, they ought to plead, *that they are both seised in jure uxoris*, and not *that the husband is seised*. *Vide Pleader*, (2 A 1.)

When Coverture shall be pleaded in Abatement.

Vide Abatement, (E 6. 11.—F 2. 7.)

As to Suits and other Matters in Equity.

Vide Chancery, (2 M 1, &c.—3 Z 1, &c.)

Appearance in Actions against Husband and Wife.

Vide Pleader, (B 4.)

Receipt of the Wife in Default of the Husband.

Vide Receipt, (A 3.—B 1.)

Vide also Bankrupt, (D 7. 11.)

B A R R E T R Y.

(A) Barretor, who shall be.

A Common barretor is a common quarreller in his own cause. *R. 8 Co. 36. b. Vide Maintenance.*

So, a common exciter, or maintainer of quarrels, or suits in courts. *Co. L. 368. a.*

Whether they are courts of record, or not of record. *Co. L. 368. a.*

Or, in the country : as, if he move or maintain affrays, &c. in his own cause, or between others. *Co. L. 368. a. R. 8 Co. 36. b.*

If by force, or craft, he gain the possession of the lands or goods in controversy. *R. 8 Co. 36. b. Co. L. 368. a.*

If he maliciously purchase a *supplicavit* for the peace, to enforce a composition. *8 Co. 37. b.*

If he invent, or disperse false rumours, whereby discord arises. *R. Co. 36. b. Co. El. 368. b.*

If a man commit common barretry, he shall not be excused, because he is a common solicitor. *R. 1 Rol. 355. l. 25.*

Or, that he is a counsellor at law. *3 Mod. 98.*

(B) Who not.

BUT it will not be barretry, if a man prosecutes an infinite number of his own suits against others ; for, if he has no cause of action he shall pay costs. *R. 1 Rol. 355. l. 20.*

So, it is not barretry, if a man solicit suits without cause, if he did not know, that there was no cause of action. *Per C. J. 3 Mod. 97.*

If he spends money in the lawful suits of another. *3 Mod. 98.*

(C) Indictment for Barretry.

BY the *stat.* 34 *Ed.* 3. 1. and 2 *R.* 2. 7. justices of peace have authority to restrain barretors. *Vide Justices of Peace*, (B 29.)

And that, without any special commission of *oyer and terminer.* *R.* 2 *Cro.* 32. *Yel.* 46.

And therefore, an indictment for barretry will be good, *coram iudiciariis ad pacem*, without saying, *nec non diversas felonias audiend.*, &c. *R.* 2 *Cro.* 32. *Yel.* 46. *R. cont.* 2 *Rol.* 151.

So, an indictment *contra formam statuti*, tho' the statute of 34 *Ed.* 3. does not make the offence, but directs the punishment. *R. Cro. El.* 148. *R. Cro. Car.* 340.

The indictment shall say, *communis barretator.* 1 *Sid.* 282.

For, *communis vicinorum oppressor*, is not good. *R.* 1 *Sid.* 282. *R.* 1 *Lev.* 299.

Nor, *communis deceptor.* *R. Mod. Ca.* 311.

[But a general charge in the indictment is sufficient. *Per Ashurst J. f' Anson v. Stuart*, *B. R. E.* 27 *Geo.* 3. 1 *T. R.* 752.]

So, it must shew the place, where he was a barretor. *R. Latch*, 194. *R. Pal.* 450.

But the indictment need not shew in what instances he is a barretor. *R.* 2 *Cro.* 527. [1 *T. R.* 752.]

[The prosecutor must give the defendant notice before the trial of the particular instances that are meant to be proved. 5 *Mod.* 18. 1 *T. R.* 754.]

Vide Maintenance.

B A S T A R D.

(A) Who shall be.

A BASTARD is every one born out of lawful matrimony. *Cp.* *L.* 244. a.

Tho' matrimony be afterwards solemnized between the parties; for in such case he is a bastard by the common law, tho' he be a mulier by the civil law. 1 *Rol.* 357. l. 47. 50. 359. l. 30. 37.

So, if a man marry a second wife, the first being alive, the issue between them will be bastards; because the second marriage is void. 1 *Rol.* 357. l. 40.

So, if a man marry, and be afterwards divorced *à vinculo*, the issue between them born before, or after the divorce, will be bastards. 1 *Rol.* 359. l. 35. 360. G. *Vide Baron and Feme*, (C 1, &c.)

So, if a man marry, who has an apparent impossibility of procreation, and his wife have a child, it will be a bastard; as, if the husband was an eunuch. 1 *Rol.* 358. l. 5.

If the husband was but seven or eight years old. *Co. L.* 244. a. 1 *Rol.* 359. l. 1—10.

If the husband was not within the four seas for such time as that it may be his issue. 1 *Rol.* 358. l. 40—50. *Sal.* 122. *R. Sal.* 484. 5 *Mod.* 420.

[The old doctrine of the father's being within the four seas shall not take place; and if it be shewn there is no access, the issue are bastards. *Pendrell v. Pendrell*, H. 5 G. 2. Str. 925. *Rex v. Bedall*, T. 10 G. 2. Str. 1076, B. R. H. 379.]

So, if the husband and wife are divorced *à mensâ et thoro*, and the wife, during the separation, has a child, it will be a bastard, unless mutual access be proved; for obedience to the sentence shall be intended. R. 1 Sal. 123.

So, if there be a separation by consent, and the jury find, that there was no access between the husband and wife, the issue born will be a bastard, tho' *prima facie* access shall be intended, till the contrary be found by verdict. 1 Sal. 123.

[Where access must be presumed, yet evidence may be given of the husband's inability to get children. *Lomax v. Holmden*, M. 6 G. 2. Str. 940.]

[And where it is found, that the husband had no access, there is no presumption of legitimacy. Str. 51.]

[The child of a married woman may be proved a bastard by other evidence than that of the husband's non-access. *Goodright v. Saul*, B. R. T. 31 Geo. 3. 4 T. R. 356.]

So, if a child be born so long after the death of the husband, that it cannot be his issue, it will be a bastard. 1 Rol. 356. l. 10. 40. *Vide post*. (B).

[The sole evidence of the mother, a married woman, shall not be admitted to bastardize her child. *Rex v. Reading*, M. 8 G. 2. B. R. H. 79. *Rex v. Rook*, M. 26 G. 2. 1 Wilf. 340.]

[But she may prove the criminal conversation; and if the want of access is proved by other witnesses, that will be sufficient. *Ibid.*]

(B) Who not.

BUT, generally, a child born within matrimony is not a bastard, if the husband was within the four seas. Co. L. 244. a.

Tho' it was born within a week, or a day after marriage. Co. L. 244. a. 1 Rol. 358. l. 10. 359. l. 45.

Tho' the wife was big with child by A., and marries B., and then the child is born. 1 Rol. 358. l. 20.

Tho' the wife elope, and cohabit with a stranger in adultery, if her husband be within the four seas. 1 Rol. 358. l. 25. 30. 359. l. 52.

Tho' the wife cohabit in another country, and there take a second husband and have a child by him, it is not a bastard, but it shall be the child of the first husband by intendment of law. 1 Rol. 358. l. 35.

Tho' the wife was præcontracted, or within the degree of consanguinity or affinity, if she be not afterwards divorced. 1 Rol. 357. l. 42. 45.

And after the death of the parties, the marriage cannot be drawn in question to bastardize the issue. 1 Rol. 360. H. *Vide Baron and Feme*, (C 6.)

So, if a man have a child by a second wife, tho' he was divorced from his first for impotence, the child shall not be a bastard; for he may be *habilis & inhabilis diversis temporibus*. *Vide Baron and Feme*, (C 3.)

Tho'

Tho' the divorce was *propter perpetuam impotentiam*. R. Mo. 227. unless the divorce be annulled by sentence in the life of the parties. 1 And. 105. 2 Leo. 169.

So, a posthumous child shall not be a bastard, if he be born within 40 weeks after the death of the husband. Co. L. 123. b. Pal. 9. Godb. 281.

So, if it be born within a few days after the 40 weeks, if it can be proved, by circumstances, to be the issue of the husband; for the law does not appoint any certain time for the birth of a child. R. 1 Rol. 356. l. 10. 2 Cro. 541. Pal. 9. [Vide Hargrave and Butler's Notes to Co. L. 123. b.]

So, if the wife marry a second husband, presently after the death of her first, it may be the child of the one, or the other, according to the circumstances of the case. Co. L. 8. 1 Rol. 357. l. 30. Pal. 10.

If born above 40 weeks after the death of the first husband, it shall be the child of the second husband. Pal. 10.

If within seven months after the death of the first husband, it shall be the child of the first husband.

(C) The Writ *de Ventre inspiciendo*.

IF there be a question, Whether a woman be *enseint* at the death of her husband? the true heir, to whom the land descends, may have a writ *de ventre inspiciendo*. Reg. 227. a. Co. L. 8. b.

And to obtain it, he shall make a suggestion in *Chancery*. Mo. 523.

The writ commands the sheriff to impanel a jury of women, to search whether she be *enseint*. Mo. 523. Cro. El. 566. Reg. 227. a.

If the twelve women give a verdict, and return, that the woman is *enseint*, another writ shall go, commanding, that she be safely kept, &c. and duly inspected by the women, who must be present at her delivery. Cro. El. 566.

But an heir apparent shall not have a writ *de ventre inspiciendo*. Co. L. 8. b.

And if the woman marry after the death of her husband, she shall not be taken out of the custody of the second husband, if he gives a recognizance, that she shall not be removed, and that some of the women shall daily inspect her. 2 Cro. 686.

(D) Bastardy.

(D 1.) When it shall be pleaded.

IN a real action, where the demandant makes title as heir; as, in *assise of cosinage*, &c. the tenant may plead, *that the demandant is a bastard*, generally. Rast. 29. b.

So, in a writ of entry. Rast. 279. b.

So, he may say, *that such an one, thro' whom the demandant claims, is a bastard*. Rast. 105. a.

So, where the defendant makes title as heir, the plaintiff may, by his replication, say, *that the defendant is a bastard*. Rast. 314. b. 315. a.

So, the defendant may plead bastardy specially; as, *that he was born before espousals, and so a bastard.* 2 Rol. 586. l. 20.

Or, *that he was born of a second wife, living the first.* 2 Rol. 586. l. 8.

So, *that there was a divorce à vinculo, and so he is a bastard.* 2 Rol. 586. l. 37.

To bastardy pleaded, the plaintiff may reply, *that he is legitimate, and not a bastard.* Raft. 29. b.

(D 2.) How tried.

Special bastardy shall be tried by the country. 2 Rol. 584. l. 35. 586. l. 7. 20. 3 Leo. 11.

So, general bastardy, where it is not directly in issue. 2 Rol. 584. l. 17. 31. 35. *Vide Certificate, (A 2.)*

Or, if it be alleged in a dead person, or a stranger to the action; for it is not reasonable, that a man, not a party, should be concluded by a peremptory trial. 2 Rol. 584. l. 25. 30. 3 Leo. 11.

So, if it be alleged in an infant plaintiff or defendant. 2 Rol. 584. l. 38. 47. 586. l. 40.

If it be pleaded in abatement. 2 Rol. 588. l. 12.

So, in an action for slandering him with the name of bastard, if the defendant justifies, it shall be tried by the country. 2 Rol. 586. l. 25. Heb. 179.

But regularly, general bastardy shall be tried by the certificate of the ordinary. 2 Rol. 586. l. 5. 12. 1 Rol. 361. l. 30. *Vide Certificate, (A 1.)*

In a personal plea, as well as in a real. 2 Rol. 865. l. 30. 1 Rol. 361. l. 45.

If issue be joined upon bastardy, before a writ to the bishop for trial, proclamation shall be made in the same court. 1 Rol. 361. l. 35. Raft. 29. b. *By the stat. 9 H. 6. 11.*

And afterwards the issue shall be certified into the *Chancery*, where proclamation shall be made once in every month for three months, whereby all persons may have notice to attend the bishop. *By the stat. 9 H. 6. 11. Raft. 29. b. 1 Rol. 361. l. 35.*

And by the same statute, the chancellor shall certify the same court of such proclamations in *Chancery* made, and thereupon a proclamation shall be made *de novo* in the same court. Raft. 29. b. 1 Rol. 361. l. 39.

And then a writ shall be directed to the bishop to certify bastard, or not. 1 Rol. 361. l. 31. Raft. 105. b.

The bishop cannot make a certificate of bastardy, but upon the king's writ to him directed. 1 Rol. 361. l. 31. *Vide Certificate, (A 5.)*

And upon issue joined, and transmitted to him. 1 Rol. 361. l. 41.

The bishop returns the writ with his certificate. 2 Rol. 592. l. 20. Raft. 105. b.

The certificate ought to be positive. *Vide Pleader, (2 Y 10.)*

Yet if he certifies, that he is a bastard, *prout per inquisitionem nobis constat*, it is sufficient. 2 Rol. 591. l. 47. Raft. 105. b.

That he was born in lawful espousals; tho' he does not say expressly, that he was a *mulier*. 2 Rol. 591. l. 30. 40.

So,

So, if he says, that he was a bastard; tho' he afterwards adds matter which shews him to be a *mulier*. *R. 2 Rol. 592. l. 35.*

The certificate must be under the seal of the ordinary, and not of his commissary. *1 Rol. 361. l. 52.*

And if it be in vacation, under the seal of the guardian of the spiritualties. *2 Rol. 592. l. 22.*

And the guardian cannot delegate the authority to another. *R. 2 Rol. 592. l. 25.*

The certificate of the ordinary, in case of bastardy, is final. *1 Rol. 362. M.*

And if the ordinary certify a man, who is a party to the issue to be a bastard, and there be judgment given upon it, it shall be peremptory to him for ever. *1 Rol. 362. l. 20.*

And he can never have a writ to certify it again.

Tho' it be in a personal, as well as in a real action. *1 Rol. 362. l. 25.*

But a certificate, that he is a *mulier*, is not peremptory; for he may be a bastard by the common law, tho' he be a *mulier* by the civil law. *1 Rol. 362. l. 5.*

So, if he be certified to be a bastard, it is not peremptory, unless judgment be afterwards given. *1 Rol. 362. l. 33.*

Or, if the plaintiff afterwards be nonsuited. *1 Rol. 362. l. 35.*

Otherwise, if the writ abates by the death of him who is found bastard. *1 Rol. 362. l. 38.*

So, if a stranger be found a bastard by the country, it is not peremptory. *1 Rol. 362. l. 13.*

Bastardy may be tried by the country, after the death of the bastard.

So, after the death of the father and mother, tho' they cohabited as husband and wife in their lifetime; for the rule, that none shall be bastardized after his death, extends only to the case of *bastard eigne & mulier puiſne*. *R. 1 Sal. 120. 3 Lev. 410.*

(E) When a Bastard shall take an Estate, and when not.

A Bastard is *nullius filius*. *Co. L. 123. a.*

[But this applies only to the case of inheritances. *1 Term Rep. 101. Com. 3.*]

And therefore, if land be limited to the use of a man for life, and afterwards to the eldest son of B., A, bastard of B., tho' he be the eldest son, shall not take the remainder. *Vide Co. L. 3. b.*

So, if it be limited to the eldest issue of B. upon the body of C. begotten. *Co. L. 3. b. 2 Rol. 44. l. 5.*

Or, to the eldest issue male of B. upon the body of C. be it legitimate or illegitimate. *Co. L. 3. b.*

Or, to the eldest issue male of B. upon the body of C. legitimate or illegitimate, so that it be reputed the eldest issue of B. upon the body of C., for he cannot have a name by reputation at his birth; and if he does not take it at his birth, he never shall take it; and therefore a bastard cannot take a remainder, limited before his birth. *Co. L. 3. b. Cro. El. 510. cont. in the same case. 2 Rol. 43. l. 45. Mo. 430. [Vide Hargrave's Notes to Co. L. 3. b. 1.]*

Tho' *B.* and *C.* intermarry after the bastard born, whereby he is a *mulier* by the civil law. *Co. L. 3. b.*

So, if there be a grant to *A. the son of B.*, and *A.* is a bastard, it will be void. *2 Rol. 43. l. 40.*

So, a bastard shall never take by descent. *Vide Descent, (C 12.)*

So, if a man covenant to stand seised to the use of his bastard son, it will be void without any express consideration; for the bastard is not his son but a stranger. *R. Dy. 374. b. Co. L. 123. a. 2 Rol. 785. l. 25.*

Tho' it says, in consideration of love to *B. his reputed son.* *R. 2 Rol. 785. l. 30.*

So, if the father had conveyed lands in chivalry to his bastard, it was not void for the third part, within the statute 32 *H. 8. 1.*; for a bastard is not the son or child of any one. *R. Dy. 296. b. 313. b. 345. a. Co. L. 123. b. 78. a.*

But when a bastard has obtained a name by reputation, he may take, by purchase, an estate granted to him by his name of reputation. *Co. L. 3. b.*

And therefore, if an estate be granted, or a remainder limited to the son or issue of *A.*, the bastard shall take, when he is reputed by such name. *Co. L. 3. b. 2 Rol. 44. l. 5. 10. Adm. 1 Sid. 194.*

So, if the mother devise goods to all her children; a bastard child shall take. *Mo. 10.*

So, if the father do so; for he may take by devise, tho' not by grant. *Qu. Mo. 10.*

A bastard may purchase to him and his heirs generally, tho' he can have no heir, but the issue of his body. *Co. L. 3. b.*

(F) When the Possession of the *Bastard Eigne* binds the *Mulier*.

SO, if a *bastard eigne*, who is a *mulier* by the spiritual law, enters after the death of his father, and continues in possession for his whole life, without interruption, and dies seised, and his son enters; by such descent the *mulier puisne* shall be bound for ever. *Co. L. 244.*

So, if the *mulier* enter upon the bastard, who afterwards recovers against the *mulier* in an assise, and dies seised; for, by the recovery, the interruption was avoided. *Co. L. 245. b.*

So, if the bastard die seised, and the *mulier puisne* enter before the heir of the bastard; for the descent binds him, not the entry of the heir. *Co. L. 244. a.*

If the bastard die seised, and his wife is afterwards endowed. *Co. L. 244. a.*

So, if the *bastard eigne* enter into religion. *Co. L. 244. a.*

Tho' the descent was of services, reversion, &c. *Co. L. 244. a.*

Tho' the *mulier* was a *feme-covert*. *Co. L. 244. a.*

Tho' the *mulier puisne* was an infant at the time of the descent. *Co. L. 244. a. Dub. Pl. Com. 372. a.*

Or, die, his wife *privement enseint*, and then the bastard dies seised. *Co. L. 244. a.*

So, if the *bastard eigne* and *mulier puisne* enter as parceners, and the bastard sister dies seised. *Co. L. 244. a.*

But if a bastard, who is not a *mulier* by the spiritual law, enter,

his

his dying seised, and a descent, do not bind the *mulier puisne*. Co. L. 244. b.

So, if the king seizes for a contempt of the father, or upon an office which finds the *mulier heir*. Co. L. 245. b.

So, if the *mulier puisne* enter upon the bastard, tho' he afterwards re-enter by disseisin, and die seised. Co. L. 245. a.

So, if the guardian of the *mulier*, or any by his command enter. Co. L. 245. a.

So, if the bastard die, his wife *privement ensient*, and the *mulier puisne* enter before the birth of the child. Co. L. 244. a.

So, if the bastard die without issue, and the lord by escheat enters; for there must be a descent. Co. L. 244. a.

So, an entry by the *bastard eigne*, a dying seised, and a descent of an estate-tail do not bind the *mulier puisne*. Co. L. 143. b.

(G) When a Bastard shall be maintained.

(G 1.) By the Parish.

BY the *stat. 18 El. 3.* two justices of the peace (one *quorum*) next to the parish church where a bastard is born, shall take order for the punishment of the mother, (who, by the *stat. 7 Jac. 4.* if the bastard may be chargeable, &c. shall be sent, for a year, to the house of correction, and for the second offence, till she find sureties for her good behaviour, and of the reputed father, and for relief of the parish in part, or in all, and keeping of the bastard, by charging the mother, or reputed father, with a weekly payment, &c.

[But both justices must be present at the same time and place, when a woman is examined and committed for not filiating a child. 2 Bl. Rep. 1017.]

Before this statute, (and since, where there is no order of justices,) the parish in which the bastard was born without fraud, must maintain it till it gains a subsequent settlement. Per Jones, 2 Bul. 349. Per two J. of assise. 2 Bul. 350. Acc. Mod. Ca. 213.

But, if the inhabitants of B. remove a woman with child to the confines of T. where she has a bastard, T. shall not maintain it, but B., for it was a fraud in the inhabitants of B. Per Jones, 2 Bul. 349.

If a woman with child be sent by the parish of B. to an house of correction in T., and she is there delivered of a bastard, T. shall not maintain it, but B.

So, if she be sent by order of two justices to T., as her last settlement, where she has a bastard, but the order, upon appeal to the quarter sessions, is reversed. R. 1 Sal. 121. 532.

[If a woman with child of a bastard be removed, and privately return, the settlement of the bastard is where she was sent. Str. 476.]

[The bastard of a certificate person is settled where born. Str. 1168. Bur. Set. Ca. 25. 187. 264.]

[The mother of a bastard may retain it with her till the age of seven years, tho' settled in a different parish. Sess. Ca. vol. 2. 89.]

[But the parish in which it is settled must maintain it notwithstanding. Caldecot, 6. Doug. 7.]

[By *stat. 13 Geo. 3. c. 82.* bastard born in lying-in hospital shall be maintained by the mother's parish, which shall pay for removing mother and child thither, if within 20 miles.]

(G 2.) By Order of Justices of Peace.

By the *stat. 18 El. 3.* an order for maintenance of a bastard must be by two justices next to the parish church where it is born, (*quorum unus*,) &c.

By the *stat. 3 Car. 4.* justices of peace, in the sessions, may do all that two justices could do by the *stat. 18 El. 3.*

And therefore now, the quarter sessions may make an original order, as well as upon an appeal from an order of two justices; and in both cases the order of sessions is final. *R. Cro. Car. 341. 350. 2 Bul. 355. Pridgeon. 2 Bul. 343. Cro. Car. 470. Jon. 330.*

[An original order may be made at sessions, and it is good tho' it does not shew defendant was summoned. *Rex v. Cleg, M. 8 Geo. Str. 473.*]

[It is declared by the court, that by *stat. 3 C. 4.* the sessions may proceed originally in cases of bastardy. *Rex v. Reading, M. 8 G. 2. B. R. H. 79.*; and again *Rex v. Jenkin, T. 9 G. 2. B. R. H. 301. Doug. 632.*]

[But if there is an order of two justices before, sessions has no jurisdiction, but on appeal. *Rex v. England, H. 8 G. Str. 503.*]

And it cannot be varied by the justices of assize, or other two justices of the peace, nor by *B. R.*, unless where the order is not conformable to the statute. *R. Cro. Car. 471. Per Jones; 2 Bul. 355. 1 Vent. 310.*

By the *stat. 6 G. 2. 31.* if a single woman be delivered, or declare herself with child of a bastard, likely to be chargeable to a parish, or any extra-parochial place; and on oath, in writing, before one or more justices of the county or corporation, charge any one of getting her with child, the justices, on application of any overseer, may grant a warrant against the person charged, and shall commit him to gaol, or the house of correction, unless he give security to indemnify the parish, or a recognizance to abide the order of the next quarter, or general sessions.

[If a soldier be committed to prison for disobeying an order of bastardy, till he find sureties for performing it, he is not entitled to be discharged under the mutiny act; for the 63d clause which exempts soldiers from arrests in certain cases, is confined to civil suits. *2 T. Rep. 270. Rex v. Bowen, H. 33 Geo. 3. 5 T. R. 156.*]

[The court will not grant a *certiorari* to remove the order of sessions, by which a soldier is continued in custody on such a charge. *Ibid.*]

Provided, if the woman die, marry, miscarry, or be not with child, or no order be made within six months after the delivery, &c. he shall be discharged, &c.

[But the quarter sessions may vacate an order of two justices upon an appeal, and afterwards make a new order, tho' not without vacating the former order of two justices. *Per Kel. 1 Mod. 20. Sal. 475. 2 Bulfr. 355.*]

So, after vacating the former order of two justices, or upon an original application to the quarter sessions, the court may refer the examination of the matter to two justices, and after their report, make an order. *R. 2 Bul. 343. Per Twissd. 1 Mod. 20. Cont. 1 Vent. 48.*

So,

So, a person, charged by order of two justices, can never afterwards be charged, if that order be discharged by the quarter sessions. 1 Vent. 48.

The appeal must be at the next general session; for if the order says, *at the next general quarter session*, it is bad; for perhaps the next quarter session is not the next general session. 1 Sid. 363. R. Sal. 480. 482. [Cro. Car. 341. 350.]

[But if a court of general quarter sessions next after an order of bastardy quash the order, the court of B. R. will not intend that a court of general sessions intervened; and unless that appear, the order of sessions will be confirmed. Rex v. Chichester, M. 30 Geo. 3. 4 T. R. 496.]

So, *at the next general sessions for the same division*, Per three J. Kel. cont. 1 Sid. 149.

At the next sessions after notice of the order. 1 Sid. 326.

By stat. 13 Geo. 3. c. 82. the officers of the parish of a woman brought to bed of a bastard in a lying-in hospital, have power to apprehend reputed father, take security, punish parents, &c. as if child born in that parish.]

[The keeper, &c. of lying-in hospital shall carry women before admitted, before a justice, to be examined on oath, whether married or single; if unfit to be carried then, to take her as soon as recovered; unless she brings an affidavit, sworn by her before a justice, that she is married or single.]

[When a woman is delivered of a bastard in a lying-in hospital, the keeper, &c. shall give notice four days before her discharge, to the overseers of the parish where the hospital stands, who shall carry her before a justice to be examined as to her settlement; if she is not well enough, he shall stay till further notice. Keeper may detain woman till well enough, and till examined, but not longer than six weeks without her consent.]

(G. 3.) *What shall be a good order.*] An order for maintenance of a bastard, must be made by two justices (*quorum unus*). 1 Sid. 222. R. Sal. 477.

[There must be *quorum unus*, even by justices in a borough. Rex v. Heslop, P. 7 G. 2. Str. 974.]

[The order must express that the bastard was born in the parish to which the relief is given. Rex v. Butcher, T. 7 G. Str. 437.]

[It is not sufficient, that it is alleged, in the complaint, where the child was born; there must be an adjudication of it by the justices, or appear by their words. Rex v. Godfrey, P. 10 G. 2 Ld. Raym. 1363.]

[If the order says the woman was delivered of a child baptized in the parish of A., it shall be understood to be born there. Rex v. Moravia, P. 15 G. 2. Str. 1166.]

[It must express the name and the sex. Rex v. England, H. 8 G. Str. 503.]

[It must shew, that the child is a bastard, and likely to be a charge to the parish. R. 1 Vent. 37. Cont. Sal. 475.]

At least by words *tantamount*, which are sufficient; as, if it says, *to pay so much expended by the parish*. 1 Vent. 37.

If

If a woman have an husband beyond sea, it ought to shew, that the husband was absent for the whole time. *R. 2 Sal. 122.*

It must make an adjudication, that such a one is the putative father. *Semb. 1 Sid. 363.*

[And if it run "whereas it hath appeared to us, &c. without an *express* adjudication, that the person charged is the putative father, it is void. *Doug. 662.*]

[An order made on oath of the mother (a married woman) only, is bad. *Vide (A), ante.*]

[If the order states, that the husband had been absent six years, and during his absence *A.* had carnal knowledge of the wife, and therefore they adjudge him the putative father; it is bad, for that is not a sufficient reason. *Rex v. Brown, T. 2 G. 2. Str. 811.*]

[Two justices cannot acquit a man charged with being the father of a bastard, tho' the sessions may. *Rex v. Jenkins, T. 9 G. 2. Str. 1050. B. R. H. 301.*]

[If defendant is discharged on appeal, he cannot be charged by a new order. *Rex v. Tenant, M. 13 G. 2. Str. 716. Ld. Raym. 1423.*]

And both the justices must make the examination, and adjudication. *R. 1 Sal. 122. 478.*

It must give relief weekly, as the statute speaks; for so much *per month*, is bad. *1 Sid. 222.*

It must give a reasonable relief; and therefore *2d. per week*, unless it be in part only, is bad. *1 Sid. 363.*

[An order to pay so much a week till the child is nine years old, if he so long live, is good. *Rex v. Street, M. 1 G. 2. Str. 788.*]

The relief ought to continue only while the bastard continues chargeable; and therefore, *till the bastard be fourteen*, is bad; for the father may maintain it. *1 Sid. 222. Per Twissd. 1 Mod. 20. R. 1 Vent. 48. R. 1 Sal. 121. 478. 480. Qu. 1 Vent. 336.*

Or, *till the bastard, by his labour, maintains himself.* *1 Vent. 210.*

So, if an order be, to pay a sum in gross. *1 Vent. 336.* unless it be for charges expended. *1 Sid. 326. Sal. 124.*

Or, for the maintenance of two bastards; for one of them may die. *P. 3 W. & M.*

Or, to pay the charge of the midwife; unless it be satisfied by the parish. *1 Vent. 210.*

Or, to give such security, as the churchwardens shall think fit. *1 Sid. 222.*

It must direct the security in the disjunctive, viz. *to perform their order, or appear at the next sessions, and obey the order there.* *2 Bul. 343.*

And if the putative father refuse such security, one of the two justices or the sessions, upon an original order made there, tho' not upon an appeal, may commit him. *2 Bul. 341. 343. 1 Sal. 122.*

The putative father ought to be summoned before the order made. *2 Mod. Ca. 4.*

[If the putative father being summoned does not attend, the justice need not hear any evidence for him, and *B. R.* never allows exceptions to such order unless the party attends in person. *Rex v. Neal, P. 8 G. 2. B. R. H. 112.*]

But an order may be, to pay so much weekly to the overseers. *R. Sal. 122.*

To

To pay a sum in gross for the charges of the midwife, or maintenance, before expended by the parish. 1 *Sid.* 326. *Sal.* 124. *R.* 2 *Mod. Ca.* 4.

The sessions, upon an appeal, may repeal or confirm the order of two justices.

Or, if it be not conformable to the authority given to justices of peace by the statute, it may be quashed, being removed into *B. R.* by *certiorari*.

[Sessions' order to maintain a bastard, not setting forth that it was born in the county, shall be quashed, but the court will bind over defendant to appear at sessions. *Rex v. Green*, *P.* 10 *G.* 2. *B. R. H.* 364.]

So, it may be quashed for part, and affirmed for the residue. *R. Cro. Car.* 471. *R.* 1 *Sid.* 150.

But it shall not be quashed till security given by the party to appear at the next sessions of the peace, where the court may make another order upon him. *R. Sal.* 477, 478.

[Therefore defendant must appear in court, when an order of bastardy is quashed. 1 *Bl. Rep.* 198.

[If an order to pay so much *per week*, by the quarter sessions, is removed into *B. R.*, and confirmed, and defendant does not pay, it is a contempt, and court will grant attachment. *Rex v. Holland*, *M.* 9 *G. B. R. H.* 160.]

A person suspected as the father of a bastard, may be bound to good behaviour after, or before the birth, and before an order against him. *Dalt.* 39.

By the *st.* 7 *Jac.* 4. the justices of peace may commit the mother of a bastard, which may be chargeable to the parish, to the house of correction for a year; and if she offend again, then till she find sureties for her good behaviour.

But she shall not be committed for life, or if the bastard is not a charge to the parish, nor for the second offence, before conviction for the first. *R. Cro. Car.* 471. 2 *Bul.* 349.

By the *st.* 14 *Car.* 2. 12. *f.* 19. if the mother, or putative father leave the bastard upon the parish, the churchwardens and overseers may seize his or her goods, and rents of lands, by order of two justices confirmed at the sessions, and may sell such goods for the relief of the parish.

[An order, committing a woman to house of correction for not obeying order "to pay 8*d.* *per week* to maintain her bastard as long "as chargeable to parish," there to remain till she gives surety to perform, or else to appear, &c. or be otherwise discharged by course of law, is good, tho' the woman is married since the child was born, but before the order to maintain it. *Rex v. Taylor*, *P.* 5 *G.* 3. 3 *B. M.* 1679.]

[If a person be bound by a recognizance by one magistrate under 6 *G.* 2. *c.* 31. to appear at the next sessions and perform such order as shall be made on him under the 18 *Eliz.* *c.* 3. respecting bastards, the sessions can make an order of bastardy only on him, but cannot order him also to give security for the performance of that order. *Rex v. Price*, *H.* 35 *G.* 3. 6 *T. R.* 147.]

B A T T E L.

(A) Battel.

(A 1.) Trial by it; when allowed

TRIAL by battel was allowed by many of the Northern nations.
Dug. Or. Jud. 65.

And now, in an appeal of death, the defendant may join issue by combat. *Vide Cro. El. 69. Vide Appeal, (G 8.)*

And tho' one of them pleads to the country, the other defendant may join issue by battel. *R. Dy. 120. a.*

So, upon an accusation in the court of *chivalry*, the defendant may join issue by battel. *Dug. Or. Jud. 76. 2 Rusb. 113, 114, &c.*

After issue joined by battel, if combat becomes impossible by the act of God, or default of the appellant, the appellee shall be acquitted. *3 Inst. 159.*

As, if the appellant become blind; for then he shall be discharged from the battel. *3 Inst. 158, 159.*

But it is not a cause for refusal of trial by battel after issue joined, and the champions allowed, and surety given for appearance at a day to which the court is adjourned, that upon examination it appears, the champions are hired. *R. per J. 2 Rusb. 790.*

(A 2.) In a Writ of Right.

In a writ of right, if the tenant wage battel upon the mere right, it must not be done by the demandant, or tenant in proper person; for then judgment should not be given if one be killed, for the writ abates; but it must be by their champions. *Dy. 301. b. Vide in Droit, (C 5.)*

And the champion must be a free man.

If the champion, after battel waged, be disabled by blindness, &c. he shall be discharged. *3 Inst. 158.*

(A 3.) Trial by the Grand Assise,

[If the *mise* be joined upon the mere right, which must be tried by grand assise of 16 ———, defendant cannot plead any other plea (as a fine and non-claim) which is to be tried by a jury of 12; but (by consent) the tenant may give the fine, &c. and the demandant, that the parties to the fine had nothing in the premises, &c. in evidence. *Tyssen v. Clarke, P. 13 G. 3. 3 Wilf. 419.*]

If the *mise* be joined in a writ of right, to be tried by the grand assise, the demandant must sue out a writ to summon four knights to elect the grand assise. *Vide Droit, (C 5.)*

The four knights appearing, *gladiis cincti*, must return in a panel the names of 20 others, with themselves; and thereupon a *venire facias* shall be awarded against the parties. *1 Leo. 303.*

The demandant and tenant shall be present with the four knights when they make their return, to make their challenges, if necessary; for, after their return, no challenge lies to the poles. *Ibid.*

At the day of return, the four knights, and twelve others of the panel shall be sworn to try the issue. *1 Leo. 303.*

The four knights are sworn to say, which has the better right; and

and afterwards the other jurors are sworn generally, as in other actions. 3 *Leo.* 162.

After issue joined, the champions find mainpernors for their appearance at the day fixed. *Dy.* 301. *b.*

And then they must appear with bare heads, bare legs, and bare arms from the elbow, introduced by two knights. *Ibid.*

At the place fixed for their appearance, the court sits upon a bench, with a bar for the serjeants. *Ibid.*

If the demandant does not appear, there shall be final judgment against him. *Dy.* 301. *b.* *Vide Droit,* (C 6.)

(B) Duel.

BUT a duel without authority of law, is punishable as homicide, if death ensues.

So, if death do not ensue, the engagement was punished by censure in the Star-chamber, and the party shall be fined and imprisoned, and bound to his good behaviour. 3 *Inst.* 157, 8.

So, the challenge was punishable in the Star-chamber. 3 *Inst.* 158.

And it will be a breach of the peace if it be made by word, message, or writing. 3 *Inst.* 158.

So, if a sheriff, justice of peace, constable, or other peace officer, see a duel, or affray, he ought to endeavour to part, and apprehend the parties, otherwise he shall be fined and imprisoned. *Ibid.*

So, if he prays assistance of any who are present, and they refuse, they shall be fined and imprisoned. *Ibid.*

So, every by-stander, tho' he be not an officer, may endeavour to part them, and shall have a remedy, by action, if he be struck or hurt in his endeavour. *Ibid.*

If any be killed, or thrown down as dead in such affray, every by-stander ought to endeavour the apprehending of the offender, otherwise he shall be fined and imprisoned. *Ibid.*

B A T T E R Y.

(A) Battery ; what shall be.

A BATTERY may be upon the person of a man, by striking him with an hand, or some instrument.

A fortiori if he wounds him.

So, if a man thrust or push another in anger. *Per Holt, Mod. Ca.* 149.

Or, hold him by his arm.

Or, spit in his face. *R. Mod. Ca.* 172.

So, if he strike a horse upon which the party rode, whereby he is thrown. 1 *Mod.* 24. *R. Jon.* 244.

If in a struggle for the way, or other contest, he touch him. *Mod. Ca.* 149.

[Trespas and assault will lie, for originally throwing a squib, which after

after having been thrown about by other persons in self-defence, at last put out the plaintiff's eye. *Scott v. Shepherd*, C. P. 13 G. 3. 3 *Wils.* 403. 2 *Bl.* 892.]

If a man strike a *feme-covert*, the husband and wife may maintain trespass for this battery.

So, the husband alone, for a battery, *per quod consortium uxoris amittit*. 2 *Rol.* 556. l. 40.

Or, for a menace and battery of the wife, *per quod negotia sua infecta remanebant*. R. 2 *Rol.* 556. l. 45.

But it is not a battery, if a man deliver a *subpœna* to another. R. 2 *Rol.* 546. l. 11.

If he comes in aid of an officer, who has a warrant against *A.*, and lays his hand upon *A.*, and says to the officer, *This is the man*. R. 2 *Rol.* 546. l. 7.

So, a battery is excused by inevitable necessity: as, if a foldier, in muster, discharge his gun, and another go cross, whereby he inevitably, and against his will, hurts him. 2 *Rol.* 548. *G. Hob.* 134. R. *Mo.* 864.

Otherwise, if it does not appear to be inevitable, and without any neglect in the party. R. 2 *Rol.* 548. *G. Hob.* 134. R. *Mo.* 864.

So, a battery may be justified in his own defence.

Or, for defence of his wife, servant, or master. 2 *Rol.* 546. D.

And that upon the first assault, before a stroke given. 2 *Rol.* 547. l. 37.

If he cannot otherwise escape; for he ought to go as far from him as he can. 2 *Rol.* 547. l. 35.

Or, for defence of his goods: as, if a man will take my money. 2 *Rol.* 549. l. 7. 10.

Or, beasts which are distrained *damage-feasant*. 1 *Rol.* 549. l. 12.

Or, for defence of his possession: as, if another enter his house. R. 2 *Rol.* 548. l. 25. 43.

Or, for correction of his son. 2 *Rol.* 546.

So, if a man resist a parker. R. upon the *ss.* 21 *Ed.* 1. *de Malef. in Parc.* 2 *Rol.* 548. l. 32.

Otherwise, if he does not resist. R. 2 *Rol.* 548. l. 30.

So, it is a justification of a battery, if any apprehend a criminal to bring him to justice. 2 *Rol.* 546. l. 30.

Or, if a man hold another, to restrain him from mischief. R. 2 *Rol.* 546. l. 40.

But a man cannot justify a battery, for disturbance in building a booth. 2 *Rol.* 548. l. 40.

Nor, a battery with wounding, in defence of his possession. 2 *Rol.* 548. l. 35.

Nor, a battery by throwing stones *molliter* against a trespasser. R. 2 *Rol.* 548. l. 45.

(B) What shall be a Mayhem.

BUT if a man wound another, *per quod redditur inutilis ad pugnandum*, it shall be a mayhem. Co. L. 126. b. 288. a.

As, if he cut off his hand or leg. H. P. C. 133. Co. Ent. 52. c. Co. L. 288. a.

Or, if he break his leg. 2 *Inst.* 313. *Hard.* 408.

If

If he cut the veins and sinews, whereby the party loses the use of his fingers. 1 *Leo*. 318. *Co. Ent.* 52. a.

Or, cut off his thumb or any of his fingers. 1 *Leo*. 139. *Co. L.* 288. a.

Or, strike off his arm. *Ibid.*

Or, if he does any thing whereby he loses the use of any such member. *Ibid.*

So, if *virilia alteria abscindit, aut castravit.* 3 *Inst.* 63. 118.

So, if he beat out his teeth. *H. P. C.* 133. *Dub.* 2 *R.* 3. 13. b. *Co. L.* 288. a.

If he cut him across the nose, whereby he loses his smelling. *Dub.* 2 *R.* 3. 13. b.

So, if he put out his eye. *Co. L.* 288. a.

If he break his skull. *Ibid.*

But cutting off an ear is no mayhem. *H.* 133.

Mayhem is justified in defence of his life. 2 *Rol.* 547. l. 40.

Or member. *Co. Ent.* 52.

(C) What only an Assault.

IF a man strike at another, and do not touch him, it is no battery, but it will be an assault. 2 *Rol.* 545. l. 45.

So, if he lift up his weapon to strike, but does not. *R.* 1 *Vent.* 256. *D.* 1 *Sal.* 79.

If he throws stones, water, or other liquor upon him. *Reg.* 108. b.

So, if he surround his house with intent to beat him.

If he use menacing words to him in his presence, whereby he dares not stay in the town. 2 *Rol.* 545. l. 41.

As, if he threatens that he will cut off his arm, &c.; for a threat seems to amount to an assault. 2 *Rol.* 545. l. 20—40.

Or, hold him by his arm. 2 *Rol.* 545. l. 23.

Or, deliver a *subpœna* to him. 2 *Rol.* 545. l. 47.

But it is no assault, if a man speak menacing or provoking words against another in his absence.

Or, strike at him at such a distance that he cannot touch him, or put him in fear.

Or, in order to restrain him from a mischief to himself: as, to hold one by his arm, who would stop his water, throw down his booth, &c. 2 *Rol.* 547. l. 13. 15.

Or, from mischief to another: as, him that excites a dog against another. 2 *Rol.* 546. l. 41.

A man in a passion, &c. 2 *Rol.* 546. l. 27.

So, if he assault another for decency: as, if a churchwarden take an hat from a man's head in a church. *R.* 1 *Sand.* 11.

If the plaintiff declares for an assault and battery, he may recover for his assault only, tho' the declaration cannot be single for the assault. *Kiz.* 38. a.

(D) Or a Threat, &c.

SO, trespass lies, if a man threaten another with his life and members, *ita quod ad propria venire non audet.* *Reg.* 104. b. 2 *Rol.* 545. l. 41. Or,

Or, threaten to pull down his house, *quousque finem fecerit.* Reg. 108.

Or, if he says, that he will cut off his arm, &c. 2 Rol. 545. l. 25.

That if he call him traitor, he will defend himself upon his body, and kill rather than he will be killed. 2 Rol. 545. l. 27.

Or, will defend himself during the life of one of them. 2 Rol. 545. l. 30.

So, if he says, that if he come out of the church, &c. and speak so, he will beat him, &c. 2 Rol. 545. l. 37.

So, if he threaten a battery, unless he cease a suit against him, 2 Rol. 545. l. 35.

So, if he attempt *per insidias ad interficiendum, vel mayhemandum.* Reg. 102. a.

But it is no threat to say, that he will defend himself during the life of one of them, according to law. 2 Rol. 547. l. 20.

So, a threat is not a trespass, if no inconvenience ensues.

(E) Remedy.

(E 1.) By Action:

FOR a threat, assault, battery, or mayhem, the party shall have a remedy by action of trespass, *quare minas imposuit ita quod,* &c. Lut. 1428.

Quare in ipsum insultum fecit & ipsum verberavit, &c. F. N. B. 86. l.

And such is the form, tho' he does not wound him. F. N. B. 86. K.

Quare in ipsum insultum fecit, verberavit, vulneravit, & imprisonavit, &c. F. N. B. 86. K.

Quare cepit, imprisonavit, & in prisona quousque finem, &c. fecisset, detinuit. F. N. B. 86. K.

As to the declaration in trespass, for battery, &c. and the pleas to it, vide in Pleader, (3 M 3, &c. 11, &c. 15, &c.)

(E 2.) By Indictment.

So, mayhem is the greatest offence under felony. Co. L. 127. a.

So, for a mayhem a man be indicted, fined, and ransomed. Co. L. 127. a. b. 3 Inst. 63.

Tho' the mayhem be done by himself. Co. L. 127. b.

Tho' the person be his villein, who cannot maintain an action for it against his lord. Co. L. 127. a.

So, an indictment lies for an assault, battery, or imprisonment of a subject.

(E 3.) When the Damages shall be increased for a Mayhem.

[It is discretionary in the court whether to increase the damages or not; and they will take into consideration the provocation given by the plaintiff. *Brown v. Seymour, H. 16 G. 2. Wilf. 5.*]

If the declaration mention a mayhem, the court upon view of the mayhem may increase the damages given by the jury. 1 Rol. 572. l. 10. 15. R. 1 Leo. 139.

Tho'

Tho' the particular part in which the mayhem was be not specified. *R. Hard. 408.*

So, in battery, where the manner of the battery is described, the court upon view may increase the damages. *Per Hale, Hard. 408.*

So, the court may increase damages, upon view and examination of witnesses, where the declaration is general *quod mayhemavit*, without making any description of the mayhem, if the judge of assize certify the particulars of the mayhem, or be in court, and affirm that the particulars now proved, were given in evidence at the trial. *1 Sid. 108.*

[On view of party who had almost lost his sight, and examination of a surgeon, damages increased from 11*l.* to 50*l.* *Barnes, 153.*]

But where the declaration does not mention a mayhem, nor describe the manner of the battery, the court cannot increase the damages upon view. *Hard. 408.*

So, if the mayhem was not the act of the defendant directly, but by an horse, after the plaintiff was thrown down by the defendant. *R. 1 Sid. 433.*

Or, by a gun, which the defendant let off, and which maimed the plaintiff against his will. *R. 1 Sid. 108.*

So, if the declaration be general, *quod maihemavit*, without describing how, and the judge does not certify it. *1 Sid. 108.*

(E 4.) By Appeal.

So, he may prosecute his appeale of mayhem. *Han. Ent. 270. Co. Ent. 50. c.*

And the writ of appeal and indictment shall say, *quod felonice mayhemavit.* *3 Inst. 63. 118.*

To an appeal of mayhem, the defendant may plead *Not guilty.* *Han. 271.*

So, if he did it *se defendendo*, he may plead in bar, *son assault demesne.* *Han. 271. 277. Co. Ent. 52.*

And he must plead it, for he cannot give it in evidence upon *Not guilty.* *2 Inst. 316.*

So, the defendant may plead a release of the mayhem.

Or, of all actions personal; for the damages only are recovered in such appeal. *Lit. f. 502.*

So, the defendant may plead 20*l.* or other sum given in satisfaction. *Han. 274.*

A recovery in trespass for the same mayhem. *Co. Ent. 50. b.*

B E A C O N S.

Vide Navigation (H).

B E A S T S.

Vide Chase (E—F).—Dismes, (H 5, &c)

B E A U - P L E A D E R.

Vide Prerogative, (D 52.)

BENCH.

King's Bench.

Vide Courts, (B 1, &c.)—Pleader, (C 3. 8, &c.—3 B 3.)

Common Bench.

Vide Courts, (C 1, &c.)—Pleader, (C 4. 11, &c.—3 B 2.)

BERWICK.

Vide Scotland (B).

BESAIEL.

Vide Assise (D).

BIENS.

(A) Goods and Chattels.

(A 1.) Real.

GOODS and chattels are real or personal. *Co. L. 118. b.*
 Chattels real are such as concern a real estate; as, a term for years. *Co. L. 118. b.*

The guardianship of a ward. *Off. Exr. 74.*

Whether it belong to one by tenure, or by assignment of him of whom the lands are holden. *Ibid.*

A villein in gross for a term of years. *Off. Exr. 75.*

The interest of a tenant by statute staple, merchant, or *elegit*. *Co. L. 118. b.*

The grant of the next avoidance. *Off. Exr. 76.*

The year, day, and waste, where any one is attainted of felony. *Off. Exr. 76.*

(A 2.) Personal.

Chattels personal are cattle, household stuff, &c. *Co. L. 118. b.*
Off. Exr. 79. 81.

All fowls tame or reclaimed. *Off. Exr. 81.*

So, deer, conies, &c. tame. *Ibid.*

So, fish in a trunk, &c. *Co. L. 8. a. Off. Exr. 81.*

So, tithes severed from the nine parts. *Off. Exr. 85, 86.*

So, trees sold or severed upon a sale and emblements. *Vide post.*
 (G 1, 2.—H).

But the inheritance, or freehold of lands or tenements, is not comprehended under goods and chattels. *Co. L. 118. b.*

Yet, inheritances in the plantations are chattels for payment of debts. *R. 2 Vent. 358. Vide in Assets (C).*

[A grant

[A grant from the king of 1000*l.* *per ann.* out of the four and an half *per cent.* *Barbadoes* duty, with collateral security for payment out of other revenue, is a mere personal annuity, having no relation to lands or tenements, nor partaking of the nature of a rent, but is descendable to heirs. *E. Stafford v. Bulkeley, H. 1750, 2 Vesey, 170.*]

(B) What go to the Heir.

GOODS and chattels annexed to the freehold go to the heir, and not to the executor or administrator: as, the glass in a window; the doors and locks of an house. *Off. Exr. 86. 21 H. 7. 26. b. 4 Co. 63. b.*

So, the pales, posts, and rails for an inclosure. *12 H. 7. 26. b.*

So, furnaces, coppers, &c. fixed to the freehold. *R. 21 H. 7. 26. b. R. 20 H. 7. 13. b.* unless they are severed in the lifetime of the testator: *Semb. 1 Sal. 368. Vide in Execution, (C 4.) in Waste, (D 2.)*

So, wainscot fixed to an house. *4 Co. 64. a.*

So, pictures, glasses, &c. fixed instead of wainscot. *2 Ver. 508.*

So, millstones, &c. fixed to a mill.

[A cyder-mill is personal estate; and goes to the executor. *3 Atk. 14. Salt pans* go to the heir. *Lawton v. Salmon, B. R. E. 22 Geo. 3. 1 H. Bl. 259. n. a.*]

So, a term of years to attend the inheritance does not go to the executor, but to the heir. *R. 2 Ca. Ch. 156. 160.*

So, deer in a park, conies in a warren, and doves in a dove-house, go with the inheritance to the heir. *Co. L. 8. a. 1 Rel. 916. l. 50.*

So, fish in a pond, or piscary. *Co. L. 8. a. R. Ow. 20. 1 Rel. 916. l. 45.*

So, apples and other fruits growing at the death of the ancestor. *Off. Exr. 84.*

So, roots, &c. within the soil. *Off. Exr. 89.*

So, a coat-armour, pennons, tombstone, and monuments in a church, in honour of the ancestor. *Co. L. 18. b.*

So, charters, deeds, and other evidences of lands, with the chests in which they are preserved. *Vide in Charters.*

So, by custom goods and chattels may go as *heir-looms* with the house to the heir. *Co. L. 185. b. 18. b.*

And such *heir-looms* cannot be devised to defeat the heir. *Co. L. 185. b.*

As, the antient jewels of the crown. *Co. L. 18. b.*

The best bed, table, pot, pan, cart, or other dead chattel, moveable. *Co. L. 18. b.*

An antient horn, where the tenure of the land is by cornage. *1 Ver. 273.*

A carroome, or licence by the mayor, to have a cart in London. *Semb. 2 Ver. 83.*

What goods to the wife as *paraphernalia*. *Vide in Baron and Feme, (F 3.)*

[If a copyhold is burnt down, and money collected for rebuilding it, lodged in the hands of guardian of tenant in tail, who dies under age,

age, the money shall go to the heir, both because of the entail, and because it was copyhold; but allowance shall be made to his personal representative for the amount of interest of the sum lost, for so long as the infant lived. *Rook v. Warth*, P. 1750, 1 *Vesey*, 460.]

(C) What go to the Executor or Administrator.

BUT generally all goods and chattels, real and personal, go to the executor or administrator. *Co. L. 388. a. Vide ante*, (A 1, 2.)
—*Assets* (C).

[Hangings, tapestry, and iron backs to chimnies, belong to the executor. *Harvey v. Harvey*, M. 14 G. 2. *Str.* 1141.]

[If an executor in trust for an infant changes an estate for years into an estate for lives, and the infant dies intestate, the lease shall go to his administrator, not his heir. *Witter v. Witter*, H. 1730, 3P. W. 99.]

[The rents of an estate descended, belonged to posthumous son only from his birth. *Basset v. Basset*, M. 1744, 3 *Atkyns*, 203.]

[If a debt is owing to A., and in satisfaction of it his debtor grants him an annuity on lands for his own life, and redeemable; this annuity is part of A.'s personal estate. *Longuet v. Scarven*, H. 1749, 1 *Vesey*, 402.]

So, statutes, recognizances, obligations, and other securities for money. *Vide Off. Exr.* 90.

So, a captive or prisoner taken in war. *Vide Off. Exr.* 79, 80.

So, all chattels of a corporation sole, as a bishop, parson, &c. go to his executor or administrator, and not to his successor. *R. 4 Co. 65. a. 1 Rol. 515. L.*

Chattels in action, as well as in possession. *4 Co. 65. a.*

Whether such corporation sole be created by charter or prescription. *4 Co. 56. a.*

So, if the chattel be granted to him and his successors: as, if a term for years be granted to a bishop and his successors; his executors or administrator shall have it. *1 Rol. 515. l. 5. Co. Lit. 9. a. 46. b. 388. a.*

If an obligation or other specialty be made to him and his successors. *Dy. 48. a.*

But chattels given to a corporation aggregate, as to a mayor and commonalty, dean and chapter, &c. go in succession. *R. 4 Co. 65. a. Vide in Franchises*, (F 16.)

So, by custom a corporation sole may take goods and chattels in succession; as the chamberlain of London. *R. 4 Co. 65.*

So, if the president of the college of physicians recover in debt for practising without licence, his successor shall have a *scire facias* upon it. *R. 1 Rol. 515. l. 20.*

So, if a manor to which an advowson is appendant, be held of the king, and after avoidance the tenant dies; the king shall present by his prerogative, and not the executor or administrator of the tenant. *Co. L. 388. a.*

So, if the bishop dies after avoidance. *Co. L. 388. a.*

(D) Property of Goods, how vested.

(D 1.) By Succession.

THE property of goods and chattels, which go to the executor or administrator, immediately upon the death of the testator, vests in them. *Vide in Administration*, (B 10.)

So, the property of goods, which go to the wife as her *paraphernalia*. *Vide in Baron and Feme*, (F 3.)

So, the property of goods which go to the heir.

(D 2.) By Grant.

So, if a man grant all his goods, the property vests in the grantee. And the grant may be made without deed. *Perk. Grant, sect. 57.*

If he grant *omnia bona & catalla sua*, all his goods and chattels, real and personal, pass. 2 *Rol.* 58. l. 17.

So, if he grant *bona sua*, without saying *omnia*. 2 *Rol.* 58. l. 17.

And by such grant of *all his goods and chattels*, a term for years, which he has in right of his wife, passes. *R.* 2 *Rol.* 58. l. 19.

So, goods which he has as executor. *R.* 2 *Rol.* 58. l. 21. 4 *Leo.* 22. *R.* 1 *Leo.* 263.

So, an *interesse termini*, tho' he adds *bona in custodia sua*. *R.* 2 *Cro.* 60. or *omnia tunc bona sua*. *R.* 3 *Leo.* 153.

So, if he grant *omnia bona & catalla sua*, and deliver seisin of goods, which his wife had as executrix or administratrix, the goods which his wife had, pass. *Semb.* 2 *Rol.* 58. l. 25.

So, by such grant, a term which he had by an extent upon a statute-merchant, passes. 2 *Rol.* 58. l. 32.

So, a bond and statute, *viz.* the parchment and paper, pass. 2 *Rol.* 58. l. 10. *Vide Assignment*, (C 1.)

So, by a grant of *all his goods and chattels, moveable and immoveable, within such a park*, a lease for years, of pannage in the same park, passes. 3 *Leo.* 19.

So, by a grant of *all his goods and chattels being in such an house*, a lease for years of the house, as well as the goods in it, passes. 3 *Leo.* 19.

But by a grant of *all goods and chattels*, trees growing do not pass. 2 *Rol.* 58. l. 5.

Nor, charters which concern the land. 2 *Rol.* 58. l. 12.

Nor, the chest in which the charters are preserved. 2 *Rol.* 58. l. 15.

[A parol gift without some act of delivery, will not alter the property, and such act is necessary to establish a *donatio causa mortis*. *R. Smith v. Smith*, *M.* 7 *G.* 2. *Str.* 955.]

By Devise.

Vide Demise.

By Pledge.

When the property of goods vests by pledge, &c. *vide in Mortgage* (A).

(D 3.) By Sale.

So, if a man sells his goods to another, the property vests in the vendee.

[They may afterwards re-vest in the vendor, if the contract is rescinded by the consent of both parties, and before the right of other persons are concerned. *Salte v. Field*, B. R. E. 33 Geo. 3. 5 T. R. 211. *Smith v. Field*, B. R. M. 34 Geo. 3. 5 T. R. 402.]

[But the consent of *one* of the parties only is sufficient to rescind the contract. *Ibid.*]

Tho' he suffers them to be in possession of the vendor. *Perk. Grant*, sect. 92.

[A bill of sale assigns the property of a ship. *Walker v. Preswick*, T. 1755, 2 *Vesey*, 622.]

[Sale of goods in a shop, tho' not in *London*, where there is no suspicion of fraud in the buyer, shall change the property. *Semb. per Hardwicke C. J. Harris v. Shaw*, M. 10 G. 2. B. R. H. 349.]

So, if he sell in *market overt*, goods in which he has no property, without covin, the property vests in the vendee. *Vide in Market* (E).

[If *A*, a merchant abroad, sends goods to *B*, a merchant in *London*, for *B*'s use, and draw on him; and if *B* receive the goods and do not pay the bills, but die insolvent, *A* has no lien on the goods. 3 *P. W.* 185.]

Tho' the owner be an infant, *feme-covert*, beyond sea, &c. 2 *Inst.* 713.

But this does not extend to goods of the king. 2 *Inst.* 713.

Nor, to a gift in a market; for it must be a sale upon a valuable consideration. 2 *Inst.* 713.

Nor, to a sale by covin; as, if the vendee knew the goods to be another's. 2 *Inst.* 713.

Or, if the sale be in a back-room, warehouse, &c. 2 *Inst.* 713.

Or, in an improper place; as, plate in a scrivener's shop. 2 *Inst.* 713. R. 5 Co. 83. b.

If the contract was commenced out of the market. 2 *Inst.* 713.

Or, made in the night before the rising, or after the setting of the sun. 2 *Inst.* 714.

If the vendee knew the vendor to be an infant, *feme-covert*, &c. who have no authority to sell. 2 *Inst.* 713.

So, it does not extend to a sale to a man of his own goods. 2 *Inst.* 713. *Doct. & Stud.* 40. b.

So, if *A* sell his goods, which are afterwards taken in execution, and sold by the sheriff, and afterwards *A* redeems them; he has a new property, which goes to his executor, and not to the vendee. R. 4 *Mod.* 52.

(E) When the Property is not vested.

BUT if a man take the goods of another by wrong, that does not alter the property.

As, if thieves steal goods, the property is not vested in them.

So, if pirates take goods. *Grot. de J. B. et P. l. 3. c. 9. f. 16.* R. 1 *Rol.* 285.

And tho' the king grant *bona piratarum* to the admiral, and goods taken

taken *piraticè* are brought to *England*, the owner may take them; for the grant extends only to the proper goods of the pirates. *R. 1 R. 1. 285. 3 Bul. 28. 148. Vide Admiralty, (D—E 3.)*

So, if a pirate sell goods, taken *piraticè*, to *A.*, the owner may take them. *3 Bul. 29.*

So, tho' the wrong-doer sell the goods to the owner himself. *Doct. & Stud. 90.*

Or, die in possession; for a descent does not toll a right to goods. *Co. L. 249. a.*

[*A.* agrees to sell goods to *B.* who pays a certain sum as earnest; the goods are packed in clothes furnished by *B.*, and deposited in a building belonging to *A.* till *B.* shall send for them; but *A.* at the same time declares that they shall not be carried away till he is paid. This is no delivery to *B.*, and vests no property in the goods in him. *Goodall v. Skelton, C. P. T. 34 Geo. 3. 2 H. Bl. 316.*]

[*A.* agreed to buy some articles of plate of *B.*, who was to get *A.*'s arms engraved on them, and to pay for the engraving; it was holden, that a delivery to the engraver for that purpose was not a delivery to *A.*, so as to defeat *B.*'s right of stopping the goods *in transitu*, the price of the goods not being paid by *A.* *Owenston v. Morfe, B. R. M. 37 Geo. 3. 7 T. R. 64.*]

(F) What Things are *Nullus in Bonis*.

Fera Natura.

IN things which are *fera natura*, none can have an absolute property: as, in deer, conies. *R. 7 Co. 17. b.*

Nor, in hawks, doves, herons, pheasants, partridges, or other fowls, which are at large, and not reclaimed. *10 H. 7. 6. 30.*

Nor, in fish at large in the water.

Nor, in swans not marked, and at large. *7 Co. 16.*

But all swans are royal fowls, and may be seized to the use of the king. *7 Co. 16. a.*

Yet, a man may have a qualified or possessory property in them: as, if deer, &c. are tame. *7 Co. 17. b.*

If hawks, &c. are reclaimed.

So, if pheasants, partridges, or other fowls are tame.

If a swan be tame, *viz.* kept in his private moat or pond, tho' it be not marked. *7 Co. 16. b.*

Or, if it be kept in waters within his manor. *7 Co. 16. b.*

So, if it be lawfully marked, tho' it be at large. *7 Co. 17. a.*

So, a man may prescribe for a game of wild swans, not marked in such a creek. *R. 7 Co. 18. a.*

So, doves in a dovecote.

Young herons, &c. in their nests. *7 Co. 17. b.*

Fish in a trunk, &c.

And of such things tame or inclosed, felony may be committed. *7 Co. 18. a.*

Or, trespass lies, *quare damas, accipitres, &c. suos cepit*, if he shews them to be reclaimed. *7 Co. 17. b. Vide in Pleader, (3 M 9.)*

But if deer, fowls, &c. tame or reclaimed, attain their natural liberty, and have no inclination to return, the property shall be lost. *7 Co. 17. b.*

So, if the possession be *ratione privilegii* only, he has no property in them: as, if deer are in a park, conies in a warren, &c. 7 Co. 17. b.

And if they go out of the forest, park, &c. the forester cannot enter another's soil to re-take them. Kel. 30. Manw. 106.

So, a man may have a property in a dog. 7 Co. 18. a. R. 12 H. 8. 4, 5.

And there are four dogs, of which the law takes notice, viz. a mastiff, an hound, which comprehends greyhound, blood-hound, &c. a spaniel, and a tumbler. 7 Co. 18. a. D. Cro. El. 125.

And trover or trespass lies for them. R. 1 Rol. 5. l. 30. Ow. 94. Hob. 283. Cont. 3 Leo. 219. Adm. 2 Cro. 44. 463.

And a defendant may justify an assault in the defence of his dog. D. Cro. El. 125. Ow. 94. Vide in Pleader, (3 M 15.)

And delivery of a dog will be a good consideration for an *assumpsit*. R. Cro. El. 125. Ow. 93.

So, a man may have a property in monkies, parrots, &c.; for they are merchandise and valuable.

(G) Emblements.

(G 1.) What are.

Emblements upon the land at the death of the tenant, are chattels, and go to the executor or administrator. Vide ante, (A 2.)

And therefore, if a man sow his land and die; the corn growing goes to his executor or administrator. Co. L. 55. b.

So, if he set roots. Co. L. 55. b.

If he plant hops from old roots; for he annually manures the land, &c. R. Cro. Car. 515.

If he sow hemp, flax, or other thing of an annual profit. Co. L. 55. b. 1 Rol. 728. l. 1.

But things which give no annual profit, are not comprehended under *emblements*: as, if he sow the land with acorns. Co. L. 55. b. 1 Rol. 728. l. 5.

Or, plant oak, elm, ash, or other trees. Co. L. 55. b.

So, things which proceed annually of themselves, without the labour of men, are not *emblements*: as, grafs.

Tho' improved by the labour or industry of the lessee. 1 Rol. 728. l. 10.

(G 2.) Who shall have them.

If tenant in fee, or in tail, die after sowing of the corn, and before severance, his executor or administrator generally shall have the *emblements*. 10 Ed. 4. 1. b. 21 H. 6. 30. a. 37 H. 6. 35. b.

So, by the *st. Mert.* 20 H. 3. 2. tenant in dower.

So, every one who has an uncertain estate or interest, if his estate determines by the act of God before severance of the corn, shall have the *emblements*, or they go to his executor or administrator: as, if tenant for life sow the land, and die before severance. Co. L. 55. b.

Or, tenant *pur auter vie*, and *cestuy que vie* dies. Co. L. 55. b.

Or,

Or, tenant for years, if he so long live; or, the lessee of tenant for life. *Co. L. 55. b. 1 Rol. 727. l. 11. 15.*

Or, if a lessee at will die. *Co. L. 55. b. [Eaton v. Southby, C. P. T. 10 & 11 Geo. 2. Willes, 131. 7 Mod. 8vo. edit. 251. S. C.]*

So, if a tenant by statute-merchant, &c. sow, and be satisfied by the casual profit before severance. *Co. L. 55. b.*

So, if a joint-tenant agree, that his companion shall occupy, and sow all the land, who sows, and dies before severance, his executor shall have them. *R. Ow. 102.*

So, if his estate determines by the act of another: as, if lessee at will sow the land, and before severance the lessor determines his will. *Lit. sect. 68. [Eaton v. Southby, Willes, 131.]*

So, if a man seised in right of his wife sow, and die before severance, his executor shall have the *emblements*. *Co. L. 55. b.*

So, if the wife die before severance, the husband shall have them. *Co. L. 55. b.*

So, if a man die, his wife *privement enseint*, and the daughter enter and sow, and then a son is born; the daughter shall have them. *Co. L. 55. b. 1 Rol. 727. l. 20.*

The *ft. of Mert. 20 H. 3. 2.* which gives the *emblements* to tenant in dower, was only in affirmance of the common law. *2 Inst. 81. T. 4 H. 3. Fitz. Devise, 26.*

But by some, it was by the equity of the *ft. of Mert.* that tenant in fee, in tail, by the curtesy, for life, at will, or the like uncertain interest, shall be allowed *emblements*. *Per Prisot, 37 H. 6. 7. a. Per Fortescue & Danby, 37 H. 6. 35. b. Per Yel. but two J. cont. 21 H. 6. 30. a. 10 E. 4. 1. b.*

But where a man has a certain interest, and knows the determination of his interest, he shall not have the *emblements* at the end of his term; as, if lessee for years sow his land, and before the corn severed his term ends; the lessor, or he in reversion, shall have the corn. *Lit. sect. 68.*

So, if husband and wife are joint-tenants for life, and the husband sows, and dies before severance, the wife surviving shall have it, and not the executor of the husband. *Co. L. 55. b. Semb. 8 Aff. 21. Per five J. four cont. Dy. 316. a. and there, by an award, the wife had three parts, and the executor the fourth for his seed. Per Wray, said to be adjudged, but Poph. dub. Cro. El. 61. Dub. Noy, 149. Dy. 316. in marg. Vide 1 Rol. 727. l. 10. Dub. and the wife had one moiety, and the executor the other moiety. 2 Ver. 322.*

So, where one joint-tenant sows, and dies, the survivor shall have it. *Per Poph. 102. Acc. 2 Ver. 323.*

So, if a man devise land to *A.*, he shall have the *emblements*. *R. per three J. Win. 51.*

So, if a devise be to *A.* for life, remainder to *B.*, and before severance *A.* dies: *B.* shall have them. *Per two J. Clench cont. Cro. El. 61. Said to be adjudged, Win. 51. Godb. 159.*

So, if a devise be to *A.* for life, who dies before severance, he in the reversion shall have them. *Per two J. Clench cont. Cro. El. 61.*

So, tho' the demise was made before sowing, and the devisor afterwards sow, and die before severance, the devisee shall have them, and not the executor. *Said to be adjudged, Win. 52.*

So,

So, if a determines his estate by his own act, he shall not have the *emblements*; for they go with the land: as, if lessee at will sow, and afterwards determine his will before severance. *Co. L. 55. b. 5 Co. 116. Cro. El. 461.*

If a lessee *durante viduitate* sow, and afterwards take husband. *Co. L. 55. b. R. 5 Co. 116. Cro. El. 460.*

If a lessee surrender. *1 Rol. 726. l. 40.*

So, if the estate determines by forfeiture, condition broken, &c. for it is the act of the lessee. *Co. L. 55. b. 1 Rol. 726. l. 33. 36.*

As, if the lord enter upon a copyholder for not doing of services; he shall have the *emblements tempore seisinæ*. *Bro. Emblements, 4. 4 Co. 21. b.*

So, if a man enter by title *paramount*, he shall have the *emblements*: as, if a disseisor sow and the disseisee enter before severance. *Co. L. 55. b. R. Mo. 24. Bro. Emblements, 10. 12. 17. 20.*

So, if the disseisee enter after the corn severed by the disseisor. *R. Dy. 31. b. Dal. 30. Co. L. 55. b. R. Mo. 24.*

So, if *A.* acknowledge a statute or recognizance, and afterwards sow the land, and the conusee extend the land. *R. 2 Leo. 54.*

But if the lessee of tenant for life be disseised, and the lessee of the disseisor sow and then the tenant for life dies, and he in the remainder enters; he shall not have the corn, but the lessee of the tenant for life. *R. 5 Co. 85. a. Cro. El. 463.*

[So, if the mortgagor sows the land, and the mortgagee enters, the mortgagor will not be entitled to the *emblements*. *Moss v. Gallimore, B. R. M. 20 Geo. 3. Dougl. 283.*]

[For tho' the law considers the mortgagor as tenant at will to the mortgagee; yet, he is not so to all purposes. *Ibid. 22. 283.*]

A. lets land to *B.* for 99 years determinable on his life, proviso of re-entry, if let to tillage without licence. *C.*, under-tenant, plows and sows in the lifetime of *B.*, who dies, no re-entry being made: the proviso is gone on the determination of the lease; *A.* cannot have any advantage of it, and *C.* may enter the lands and take the *emblements*. *Johns v. Whitley, M. 11 G. 3. 3 Wils. 127.*]

(H) Trees.

ALL trees annexed to the land are parcel of the inheritance, and pass with it.

And therefore, if a man convey land by bargain and sale, grant, &c. and all trees, by express words; if the land does not pass, for default of enrolment, or otherwise, the trees do not pass. *R. 11 Co. 48. a.*

So, if a man lease lands for life, or years, with all trees, &c. the trees pass only as they are annexed to the land, and the lessee shall be subject to waste if he cuts them down. *R. 11 Co. 48. a. 2 Bul. 7.*

So, if a man lease lands for life or years, except the trees; yet those continue parcel of the inheritance, so long as they are annexed to the land, and descend with it to the heir. *R. 11 Co. 48. a.*

Or, if the lessor convey the inheritance, they pass with it to the grantee. *R. 11 Co. 48. a.*

If a feoffment be, except the trees, and the feoffee afterwards buy the

the trees, they are re-annexed, and parcel of the inheritance. 11 Co. 50. a. 4 Co. 63. b.

If tenant in tail grant his trees, and die before severance, they are afterwards re-annexed to the inheritance. 11 Co. 50. a.

If A., tenant for life, without impeachment of waste, with power to cut trees, &c. and to make leases for three lives, lease for three lives, except the trees, and die before cutting; the trees are re-annexed, and his executor cannot cut them. R. Latch, 163.

But if the owner of the soil grant all his trees, they are now severed from the inheritance.

And tho' the soil itself does not pass, yet a sufficient nutriment out of the earth for the vegetation of the trees, is granted. R. 11 Co. 49. b.

And if there be a grant to any one and his heirs, he has an inheritance in the trees, without livery. 11 Co. 49. b.

If tenant in tail grant trees, they go to the grantee and his executors. 11 Co. 50. a.

But if the tenant in tail die before severance, the grantee cannot afterwards take them. 11 Co. 50. a.

If tenant in fee lease, *excepting the trees*, and afterwards grant the trees to the lessee; they are not re-annexed to the inheritance, but the lessee has an absolute property in them. R. 4 Co. 63. b.

If he lease, *excepting trees*; he has power to shew them to a buyer, to cut and carry away. R. 11 Co. 52. a.

If he *excepts trees, but only the loppings to his wife*; the wife shall have the loppings of all the trees there. R. Jon. 376.

Lessee for life or years, has only a special interest and property in the fruit and shade of timber trees, so long as they are annexed to the land. 4 Co. 62. b. Dy. 90. b. 1 Rol. 181.

And he has a general property in hedges, bushes, trees, &c. which are not timber. 4 Co. 62. 1 Rol. 181.

And therefore, if the lessee cuts down hedges, or trees not timber, the lessee shall have them.

So, if dotards, &c. which have no timber in them, are thrown down by the wind, &c. the lessee shall have them. Mo. 812.

[But where an inclosing act empowers commissioners to make allotments, and permit persons having lands within the limits of inclosure to make exchanges, and enables tenants for life to charge their lands to a certain amount to be paid to the commissioners for the expences of inclosing, tenant for life, impeachable of waste, cannot on making an exchange cut down timber, but he must pursue the course pointed out by the act, by mortgaging the lands. 1 Brown. Ch. Rep. 194.]

So, if a man cut down timber trees, the lessee shall have trespass, in respect of the loss of his fruit and shade.

Tho' the lessor, or any one by his licence or command cut them. 11 Co. 48. b. Mo. 7. Jon. 376.

So, if an house be thrown down by tempest, the lessee may take timber for repairs. 1 Rol. 181.

So, the lessee may cut down trees for repairs. Vide in Pleader, (3 O 11.)—Waste, (D 5.)

Tho' he be restrained to take them without assignment; if there be no assignment upon request. Lut. 1480.

But

But the lessee cannot assign his term, *excepting the trees*; for he has an interest only in respect of the land (unless it be without impeachment of waste). *R. Al. 81, 82. Adm. Latch, 269.*

And if the lessor except the trees, the lessee cannot take them for repairs.

Tho' he be allowed to take them by assignment, for repairs; yet, if the lessor does not assign, the lessee cannot take them, and if he does take them, he will be a trespasser. *R. Lut. 1480.*

So, tenant after possibility cannot grant his estate, *except the trees.* *Per Jones, Lut. 270.*

But the general property of timber trees remains in the lessor, who has the inheritance of the land. *17 Co. 48.*

And therefore, if he grants the trees during the lease, the grant is good, tho' it shall not take effect till the lease be determined, without the assent of the lessee. *11 Co. 48. b. Cont. 4 Co. 62. b.*

And, if the lessee cut down trees, or pull down an house, the lessor may take the timber which the lessee does not use for repairs; for when it is severed from the land, the general property is in the lessor. *R. 11 Co. 81. b. R. 4 Co. 62. b. 63. a.*

So, if the trees, or house, be thrown down by tempest, the lessor may take them, or maintain *trover* for them. *R. 11 Co. 81. b. R. 4 Co. 63. b.*

So, if they are cut down by a stranger, or otherwise severed from the land. *11 Co. 81. b. R. per three J. Cro. Car. 242. Jon. 255.*

[Whenever timber is severed by act of God, or by wrong, it belongs to him who has the first estate of inheritance. *3 P. W. 276. Al. 81. 3 Atkyns, 751. 1 Vesey, 524. 546.*]

If he in reversion cut, and sell with the assent of the tenant for life, being a recusant, he shall have the money, not the king. *R. 1 Bul. 133.*

So, if a disseisor cut down trees, &c. the disseisee, after re-entry, shall have trespass; for he re-vests the freehold in himself *ab initio.* *11 Co. 51. a.*

And tho' he shall not have trespass against the feoffee, or lessee of the disseisor, who come in by title, or against a second disseisor: yet, if such feoffee, lessee, or second disseisor cut down trees, &c. the disseisee, after his re-entry, shall have *trover*; for the property is re-continued to him. *11 Co. 51. b.*

Tho' the feoffee, lessee, &c. had sold, or carried them off from the land; for that does not alter the property. *11 Co. 51. b.*

So, if tenant by the curtesy, or in dower, cut down trees, &c. he in reversion, or remainder, may take them, or maintain *trover* for them. *4 Co. 63. a. 11 Co. 82. a.*

So, if tenant after possibility, &c. *4 Co. 63. a. R. cont. 1 Rol. 184.*

So, if tenant for life, remainder for life, cut down trees, &c. he in the reversion shall take them, or shall have *trover* for the trees, tho' he cannot have waste during the same remainder. *R. Al. 81.*

[If *A.* is tenant for life, remainder to *B.* in tail of one moiety, and to *C.* an infant in tail of the other moiety, with remainder over, and there is timber decaying, the court will decree it to be cut, and the money divided between *B.* and *C.*, leaving sufficient estovers for *A.* And no trees for ornament or safety, tho' decaying, to be cut. *Ibid.*]

So,

So, the lessor may take, or maintain *trover* for the bark of the trees cut. *R. Cro. Car. 242. Jon. 255.*

Tho' the trees are converted to boards, &c. for the principal substance remains. *R. Mo. 19, 20.*

Tho' they are carried away, or converted at the time of cutting, or afterwards. *R. Al. 82.*

Tho' the lessor does not seize the trees before the action commenced. *R. Al. 82.*

Yet, if there be a lessee for life, or years, without impeachment of waste, he has an interest and property in timber trees, &c. and may cut them down, and convert them to his own use. *Co. L. 220. a. R. Mo. 327. R. 11 Co. 82. b.*

So, if trees are thrown down, or the house prostrated by tempest, the lessee without impeachment of waste may take them; for the entire property is in him, when the trees are severed from the inheritance by the act of the party, or of the law. *R. 11 Co. 84. a. 1 Rol. 183, 4.*

And, if the lessor afterwards sell the trees, and the lessee without impeachment cut them down, the vendee cannot have *trover* for them; for the sale was void against the lessee. *Semb. Cro. Car. 274.*

So, if a stranger cut down the trees, the lessee without impeachment of waste may have them, or maintain trespass or *trover* for them. *Contr. 4 Co. 63. a. Acc. 1 Rol. 183.*

So, lessee without impeachment may assign his term, excepting the trees. *R. Al. 82. Latch, 270.*

So, he may make a lease, except the trees. *Vide Latch, 270.*

So may tenant after possibility. *Semb. Latch, 270.*

But a lessee without impeachment has not an absolute property in the trees; for if he does not cut them down during his term, he shall not have them, but the lessor shall have them, as annexed to the freehold. *1 Rol. 182. Latch, 270.*

Bona Confiscata, &c.

Vide Waife (D).

Bona Felonum.

Vide Waife (C).

Bona Fugitivorum, et in Exigend. Positorum.

Vide Waife (B).

Bona Notabilia.

Vide Administrator, (B 4.)

B I G A M Y.

Vide Polygamy, in Justices, (S 5.)

B I L L.

Bill of Appeal.

Vide Appeal, (G 4.)

Bill by way of Appeal.

Vide Chancery, (2 O 2.)*Certiorari* Bill.*Vide Chancery*, (2 O 1.)

Bill in Chancery.

Vide Chancery, (E 1, 2.—F—G—M—Y 6.—2 N 1, &c.)

Bill of Credit.

Vide Merchant, (F 3.)

Bill for Discovery.

Vide Chancery, (2 G 3.—3 B 1, 2.)

Bill in Equity for Tithes.

Vide Chancery (3 C).—*Dismes*, (M 14.)

Bill ; when Evidence.

Vide Evidence, (C 2.)

Bill of Exchange.

Vide Action upon the Case upon Assumpsit, (A 2.)—*Merchant*, (F 4, &c.)

Bill Obligatory.

Vide Merchant, (F 2.)—*Obligation* (D).

Original Bill.

Vide Chancery, (Y 6.—2 N 1, &c.)

Bill in Parliament.

Vide Parliament, (G 11, &c.)

Bill of Review.

Vide Chancery (G).

Bill of Revivor.

Vide Chancery (F).

Single Bill.

Vide Obligation (C).

BISHOP.

Vide Certificate, (A 1, &c.)—Ecclesiastical Persons, (C 2.)—Esq. life, (H 11.)—Ireland (E).—Pleader, (3 I 12.)—Visitor, (A 8.)

BODY POLITIC.

Vide Capacity, (A 2.—B 5.)—Franchises, (F 1, &c.)

BONA NOTABILIA.

Vide Administrator, (B 4.)

BOND.

Vide Chancery, (4 D 1, &c.)—Condition, (A 5.—D 7, 8.)—Obligation. —Pleader, (2 G 12.—2 W 9. 16, &c. 46.)

BOOKS.

Vide Trade, B—D 1. 4.)

BOTTOMREE.

Vide Merchant, (E 4.)

BREACH.

Breach of an Award.

Vide Arbitrament, (G—H—I 5, 6.)

Breach of a Condition.

Vide Condition, (M 1, &c.—N—O 1, &c.—S 1, 2.)—Chancery, (2 Q 2, &c.)

Breach of Covenant.

Vide Covenant, (E 1, &c.)—Pleader, (2 V 14, &c.)

Breach of Faith.

Vide Prohibition, (G 13.)

Breach of the Peace.

Vide Justices of the Peace, (B 4, &c.)—Last, (L 5.)

Breach of Prison.

Vide Escape.—Imprisonment, (M 3.)—Justices (Q).—Officer, (G 8.) —Rescous.

Breach of a Recognizance.

Vide Bail (O—P).

Breach of Trust.

Vide Chancery, (4 W 25, &c.)

Assignment of a Breach.

Vide Pleader, (C 44, &c.—F 14, 15.)

B R E A D.

Assise, and Assay of Bread.

Vide Justices of Peace, (B 96.)—Leet, (L 8.)

B R I E F.

(A) The several sorts of Writs.

*BREVE, sicut regula juris, breviter rem enarrat, intentionem tam enarrantis plane exprimit. Co. L. 73. b.*Writs are either original or judicial. *Co. L. 73. b.*As to mesne or judicial process, *vide in Process. Vide in Execution.*And process by writ may be upon an indictment, or information, in criminal cases. *2 Inst. 40.*As well as in actions real, personal, or mixt. *Ibid.*

So, some writs are in the nature of a commission.

As, a writ of error, or false judgment. *2 Inst. 40.*A writ for election of knights of the shire for parliament. *Ibid.*Or, for election of a verderor, coroner. *Ibid.*Or, for his discharge. *Ibid.*A writ of *justicies*. *Ibid.**De ventre inspiciendo.* *Ibid.**De viis & venellis mundandis.* *Ibid.**De securitati pacis.* *Ibid.*A writ of association, *si omnes, &c.* *Ibid.*So, some writs are extrajudicial, and mandatory: as, a writ for summoning a peer to parliament. *Ibid.*Or, for summoning one to be chief justice of *B. R.* *Ibid.*Or, for taking the degree of a serjeant at law. *Ibid.*A *congé d'elire* a bishop. *Ibid.*A writ *de restitutione spiritualium.* *Ibid.*A writ of livery. *Ibid.*A writ of protection. *Ibid.*So, writs in the negative: as, *de non ponendis in assis & juratis.* *Ibid.**Quod ne exeat regnum.* *Ibid.*

B R I E F.

145

In all actions the king's writ shall be allowed *ex debito justitie*.
2 *Inst.* 40.

And, as it was established by parliament originally, it cannot be changed without authority of parliament. *Ibid.*

All writs ought to issue under the great seal, and in the king's name. *Vide Procefs*, (A 2, 3.)

A writ, generally, shall be directed to the sheriff, or coroner.
2 *Inst.* 41.

But it may be directed to the party himself. *Ibid.*

For more concerning the various sorts of writs, *vide* their respective titles.

B R I B E R Y.

Vide Officer (I).—*Parliament*, (G 5.)

B R I D G E S.

Vide Chimin, (B 1, &c.).—*Uses*, (N 4.)

Bringing M O N E Y into Court.

Vide Pleader, (C 10.)

B R O K A G E.

Vide Chancery, (3 Z 8.).—*Officer*, (A 2.).—*Usury* (D).

B R O K E R.

Vide Merchant (C).

B U G G E R Y.

Vide Justices, (S 4.—Y 13.)

B U R G A G E T E N U R E.

Vide Burrough (E).

B U R G E S S.

Vide Burrough (D).

B U R G L A R Y.

Vide Justices, (P 2, &c.—Y 7.)

B U R I A L.

Vide Cemetery (B).

B U R R O U G H.

(A) Burrough; What shall be.

BURROUGH imports an ancient town of principal note, and which enjoys particular privileges. *Lit. f. 164. Co. L. 109. Brady's Treat. of Burroughs, 2, 3.*

Every city is a burrough, but every burrough is not a city. *Co. L. 109.*

Every burrough sends burgesses to parliament; and therefore no town shall now be called a burrough which does not send burgesses to parliament. *Lit. f. 164. Co. L. 108, 9.* The writ of summons commands, *quod de quolibet burgo duos burgenfes eligi facias, &c.*; and the ancient return was, *non sunt alii burgi, &c.* But Brady says, that towns in *antient demesne*, which sent burgesses to parliament, were yet not burroughs. *Brady's Treat. of Burroughs, 36.*

So, *burgus* is used *promiscuè*.

A burrough might be within a seigniorship of the king, or of another lord spiritual or temporal. *Lit. f. 162, 3.*

Some burroughs are incorporate, and some not incorporate. *Co. L. 108, b. Hob. 15.*; but Coke says, that it was there resolved, that burroughs cannot take privilege, unless they are incorporated. *12 Co. 121.*

(B) City; What shall be.

A City is a burrough incorporate, in which there is or was a bishop within time of memory. *Co. L. 109, b.*

Yet *Westminster* is a city, tho' not incorporated.

So, *Cambridge, Leicester, &c.* were antiently called cities, tho' there never was any bishop there. *Co. L. 109, b. Brady's Pref. to the Treat. of Burroughs.*

And a city was promiscuously called *Villa, or Villata. Mod. Firma Burgi, 2.*

(C) Citizen.

As to the election of citizens to parliament, *vide in Parliament, (D 6, &c.)*

(D) Burgefs.

As to burgesses elected to parliament, and the manner of the election, *vide in Parliament, (D 7, &c.)*

How one shall be elected a burges, and what he must do after his election, and how disfranchised, *vide in Franchises, (F 20, &c.)*

(E) Tenure in Burgage.

IN antient burroughs, all, having tenements there, usually held of the king by rent, which is a socage tenure, tho' called tenure in burgage. *Lit. f. 162.*

Burrough Court.

Vide Courts, (P 1, &c.)

BURROUGH ENGLISH.

(A) Burrough English.

BY the custom in some burroughs, the youngest son shall inherit all the tenements within the same burrough, as heir to his father; and this is called *Burrough English*. *Lit. f.* 165. *Vide Gavelkind* (A).—*Copyhold*, (K 4.)

And this custom is very reasonable; for the youngest is least able to help himself. *Lit. f.* 211.

And it shall be in the same manner in copyholds as in freeholds. *R. Cro. Car.* 411.

And where the custom extends to land, it shall extend to a rent issuing out of the land. *1 Sal.* 244. *R. 2 Lev.* 87.

If such land be demised to *A.* and his heirs *pur auter vie*, it shall go to the youngest son. *2 Ver.* 226.

So, by custom, the youngest brother shall inherit. *Co. L.* 140. *b.* 110. *b.*

Or, the youngest daughter shall inherit alone. *Co. L.* 140. *b.*

So, the youngest son, if he be not of the half blood. *Co. L.* 140. *b.*

So, by custom, the eldest daughter alone may inherit. *Co. L.* 140. *b.* *Cro. Car.* 484.

But these customs shall be taken strictly: and therefore, the custom of *Burrough English* does not extend to the youngest brother, without a special custom. *2 Cro.* 198. *Cro. Car.* 411. *1 Rol.* 623: *l.* 42.

Nor, a custom for the youngest brother, daughter, sister, &c. extend to an aunt, &c. *1 Rol.* 623. *l.* 40. *4 Leo.* 242. *Godb.* 166.

Or, a niece. *4 Leo.* 242.

So, if there be a custom, that a descent shall be to the youngest son, and he dies in the life of his father; the descent shall not go to his issue, without a special custom. *Court divided*, *Jon.* 362. *R. cont.* *1 Sal.* 243. *Mod. Ca.* 120. *Vide infra.*

So, if the father die, and afterwards the youngest son dies without issue before entry; it shall not descend to his youngest, but to his eldest brother. *Dub. Jon.* 362. But it would have been clear, if the youngest son had entred. *Ibid.*

So, if the father die, and the youngest son enter, and afterwards a younger son is born, he shall not enter; for the custom shall take effect in him who was youngest at the death of the father. *Dub. Jon.* 362. *Cro. Car.* 412. *Inclined cont.* *Sal.* 244.

So, if *A.* be tenant for life, the reversion to *B.* who has three sons, and dies, and the youngest son dies in the life of *A.*, the descent shall be to the eldest brother, and not to the middle. *Dub. Jon.* 362. *Cro. Car.* 412. *Semb. cont.* *1 Sal.* 243, 4. *Mod. Ca.* 120. *Vide infra.*

Lands of the nature of *Burrough English*, in other respects usually pursue the course of the common law; and therefore, a tenant of such land shall have error, attain, &c. *Jon.* 361.

Shall have a *formedon* for the lands in tail. *Jon.* 361.

Shall be vouched; charged for the debt of his ancestor, &c. *Jon.* 361.

Shall have his age. *Jon.* 361. *1 Sal.* 243. *Mod. Ca.* 122.

So, he may vouch. *Jon.* 361.

So, the descent shall generally be governed by the rules of the common law; and therefore, if tenant of lands of the nature of *Burrough English* be seised in tail male, the descent shall be to the youngest son. *Co. L.* 110. b.

So, if such land be given to *A.* and his heirs for the life of *B.*, and *A.* dies, his youngest son shall take. *Co. L.* 110. b. *1 Sal.* 244. *R.* 2 *Lev.* 138.

If there be a surrender to *A.* and his heirs, who dies before admittance, his youngest son shall have it. *R.* 1 *Mod.* 102. *Cont.* 1 *Sal.* 243.; where the custom was found specially, that if *A.* die seised, it shall descend to his youngest son, but acc. if it was found to be *Burrough English*.

If tenant in *Burrough English* has a son and daughter by one ventre, and a son and daughter by another, and dies, and the youngest son enters, and dies, the daughter shall have it; for there shall be a *possessio fratris*. *Jon.* 361.

If he has three sons, and settles his estate to himself and his wife for life, remainder to his right heirs, and dies; the reversion descends to the youngest son. *R.* *Jon.* 361. *Cro. Car.* 411.

If the youngest son dies, and he afterwards purchases land of the nature of *Burrough English*, it will descend to the son, or daughter, of the youngest. *R.* 1 *Sal.* 243. *Mod. Ca.* 120.

If tenant in *Burrough English* be disseised, his youngest son shall enter. *1 Sal.* 243.

So, if by custom, if there be no heir male, the descent be to the eldest daughter, and, if no daughter, to the eldest sister, and, if no sister, to the eldest cousin; if the eldest daughter die in the life of her father, leaving a daughter, she shall have it within the custom, by descent from her grandfather. *R.* 1 *Rel.* 623. *l.* 45.

But the youngest son, being heir by the custom, shall not be bound by the warranty of his ancestor; for that descends to the heir at the common law. *Jon.* 361.

Nor, shall vouch upon a warranty made to the father, and his heirs. *Jon.* 361.

So, if a descent be to the youngest son, who has no son, or but one, the custom shall be suspended till there be a younger son *in esse*. *R.* *Jon.* 361.

So, a particular custom may make a variance from the general custom. *Jon.* 361.

BY - L A W.

(A) By whom it may be made.

A CORPORATION may make by-laws without an express power by their charter to make them. *R.* 10 *Co.* 31. a. *R.* *Hob.* 211. *Per Holt C. J. Trin.* 11 *W.* 3. *Vide Mo.* 579. 584. *R.* 5 *Mod.* 439. *1 Sal.* 142. *Carth.* 482.

And

And such power a corporation has, tho' it be erected within memory. *Cont. Mo.* 869. *Acc. Mo.* 584.

Tho' it be erected for a particular cause; as, for regulation of navigation, trade, charity, &c.; as, the Trinity-House. *Dub.* 2 *Jon.*

145.
So, a custom to make a by-law may be alleged in an ancient city, or borough.

So, in an upland town, which is neither city nor borough, to make a by-law for repair of the church, the good ordering of a common, or such like thing. *Co. L.* 110. *b.* *R. Cro. Car.* 498. *Adm. Hob.*

212.
So, by custom, the tenants of a manor may make by-laws for the good order of the tenants. 1 *Rol.* 366. *l.* 35. *Mo.* 75. *Adm. Hob.*

212.
So, may the homage. *Adm.* 1 *Rol.* 366. *l.* 16. *Dy.* 322. *a.* *R.* 1 *Rol.* 365. *l.* 35.

So, resiants in a leet. *Mo.* 579. 584.

And a leet, by custom, may make a by-law for good ordering of a common. *R. Cart.* 179.

So, for husbandry, or trade. *Per Lee C. J. Pal.* 396.

So, every town has power to make by-laws, without special custom, for the public good: as, for repair of a church, highway, &c. *R.* 5 *Co.* 63. *a.*

And in such cases the major part binds the others. 5 *Co.* 63. *a.* 3 *Leo.* 265. *Dal.* 103. *Mo.* 579.

But the inhabitants of a town cannot, without a custom, make by-laws for their private advantage; as, for the good ordering of a common, &c. *R.* 5 *Co.* 63. *a.*

And where they can, the major part does not bind the others, except where the custom warrants that also. *R.* 5 *Co.* 63. *a.*

So, the tenants of a manor, homage, &c. cannot make by-laws, without a custom. *R. Sav.* 74.

So, a custom, that the steward, with the consent of the homage, may make them, is not good; for the homage ought to do it. *R.* 3 *Lev.* 49.

[A by-law returned to be made by the body at large may be good, where the power is given by charter to a select number to make by-laws in the stead, for, and in the name of the whole; for it might be made by the select body acting in the name of the whole; and if found to be made in due manner, it shall be so intended. *Green v. Mayor of Durham*, *H.* 30 *G.* 2. 1 *B. M.* 127.]

[If power of making by-laws is by charter given to a select body, they do not represent the whole community, and cannot assume to themselves what belongs to it: if the power of making by-laws is in the body at large, they may delegate their rights to a select body. *Rex v. Spencer*, *H.* 6 *G.* 3. 3 *B. M.* 1827.]

[A by-law cannot superadd a qualification to an elector which the charter does not require. Thus, if charter gives the right of election to mayor, jurats, and commonalty, a by-law cannot restrain it to mayor, jurats, and such of the commonalty as have served churchwarden and overseer. *Ibid.*]

Nor, if the charter places the election in the mayor, aldermen, and commonalty, and the power of making by-laws in the mayor and aldermen,

aldermen, can the mayor and aldermen, *with the assent of the commonalty*, take the right of election from the commonalty. *R. v. Head, H. 10 G. 3. 4 B. M. 2515.*]

(B 1.) What shall be a Good By-Law.

EVERY by-law must be *legi, fidei, rationi consona*. 8 Co. 126.

And, if it be lawful and reasonable, it will be good, tho' it be not confirmed or allowed according to the *stat. 19 H. 7. 7. R. 5 Co. 63. b. 1 Rol. 363. l. 35. Vide post. (C 1.)*

[It need not in the preamble set out all the reasons for it. *Rex v. Harrison, T. 2 G. 3. 3 B. M. 1324.*]

S, if it appears to the court to be reasonable, it is sufficient, tho' it be not averred to be so by pleading. 8 Co. 126. b.

[B. R. will not enter into a question on the validity of a by-law, on the return of a *habeas corpus cum causa*, from any corporation except London, where it always doth; but plaintiff must declare there, and defendant may demur if he has objections to the by-law. *Ballard v. Bennet, Ballard v. Clement, P. 32 G. 2. 2 B. M. 775.*]

So, it may be reasonable, tho' the penalty be to be paid to those who make the by-law. *R. 1 Sal. 397.*

So, generally, it shall be reasonable, if it be for the public good of the corporation. *Carth. 482.*

(B 2.) For Regulation of a Man's Right.

And therefore, a by-law, made only for the regulation of any one in the use or exercise of that which he has a right to do, will be good; as, a by-law, that no commoner shall put his sheep in such a part of the common; for he is not restrained for all beasts, nor as to the sheep, for the whole common. *R. 1 Rol. 365. l. 25. Cro. Car. 497. Vide post. (C 4.)*

Or, that he shall not put beasts upon the common till such a day. *1 Rol. 366. l. 30.*

Or, till the farmer of the rectory there ring the bell; for he is an indifferent person. *R. 1 Rol. 366. l. 20. Dy. 322. a.*

So, a by-law for avoiding confusion in popular elections, that the mayor or aldermen, &c. shall be elected by a select number, is good. *R. 4 Co. 78. a. 3 Bul. 71.*

[It is settled that the number of the electors may be narrowed, but not that of the eligible. *3 Bur. 1833.*]

[But a by-law cannot strike off an integral part of the electors. *Id. ibid.*]

So, a by-law, that no one, not born in such a town, or an inhabitant there for three years, shall be allowed to inhabit there, without a testimonial of his good behaviour. *Hard. 56.*

So, a by-law, that every one, chosen sheriff of London, shall serve, unless he swears at the next hustings that his substance is not of the value of 10,000*l.*; and brings six witnesses, to be allowed by the mayor and aldermen, that they believe him, is good; for he ought to serve *de jure*, when he is chosen; and therefore, the by-law is in case of him. *R. Trin. 11 W. 3. B. R. Vanaker, 5 Mod. 441. 1 Sal. 142.*

[A cor-

[A corporation having right to make by-laws to govern the inhabitants, and to make secondary burgesses out of the inhabitants, and capital burgesses out of the secondary burgesses, make a by-law, that every inhabitant chosen a burgess, and refusing to serve, shall forfeit it, &c. This is a good by-law; but it relates to inhabitants refusing to be secondary burgesses only, and not to secondary refusing to be capital burgesses. *Mayor of Workingham v. Johnson*, T. 9 G. 2. B. R. H. 284.]

[A by-law of a company, to elect such and so many of their members as should seem convenient, on pain to forfeit 25 l. on refusing to accept or to pay admission-fee, is good; for the court will not presume the party elected is *unfit*; and if he *is*, it may be pleaded, or given in evidence on *nil debet*. *Vintners' Co. v. Passy*, H. 30 G. 2. 1 B. M. 235.]

[But a by-law which alters the constitution given by the crown is bad, tho' if that constitution were not in the way, it might be good.]

[As, where by letters-patent the freedom of a town is to be conferred only on such as are entitled to it by birth or servitude, or by a particular mode of election there pointed out; a by-law, that any person shall be admitted to the freedom on payment of a sum of money, is bad, for it alters the constitution. 4 *Bur.* 2260.]

(B 3.) Or, Regulation of Trade.

So, a by-law for the regulation of trade will be good; as, that no one shall use an hot press in *London*; for it is dangerous for fire, and deceit. R. 1 *Rol.* 365. l. 20. *Vide post.* (C 3.) *Vide Trade*, (D 2.)

That no one sell his cloth before it be searched at *Blackwell-Hall*. R. 5 *Co.* 63. *Mo.* 580.

That such a baker bake white bread only, such an one only brown. *Hard.* 56. 2 *Rol.* 391.

That bricklayers do not plaster with lime and hair, which is proper to plasterers. R. 2 *Rol.* 391. *Pal.* 396.

Nor, archers make bows; or, bowyers, arrows. 2 *Rol.* 391.

That cobblers do not make boots or shoes, which belong to shoemakers. 2 *Rol.* 391.

[That no one shall exercise the trade of a joiner who is not free of the joiners' company. *Wannel v. Chamberlain of London*, M. 12 G. Str. 675.]

[That butchers not free shall take their freedom in the butchers' company, and no butcher be admitted to the freedom of the city in any other company; and all butchers not free of the city, and entitled to their freedom of another company, shall be made free of the butchers' company on paying the usual fine and fees. 1 *Bl. Rep.* 372. 3 *B. M.* 1324.]

[Tho' the same by-law had been adjudged bad. 1 *Bur.* 12.]

[That no stranger use the craft of a taylor in *Bath*, except first made free, under penalty of 3s. 4d. *per diem*; founded on custom that no stranger hath used said craft there, unless made free. *Woolley v. Idle*, M. 7 G. 3. 4 *B. M.* 1951.]

So, a by-law to restrain the number of carts in *London*, without license from *Christ's Hospital*, is good. 4 *Mod.* 228, 229. *Cont. R.* 1 *Rol.* 364. l. 25. R. acc. Ray. 288. 324. 328. 1 *Sid.* 284.

Or, hackney-coaches. *Dub.* 4 *Mod.* 227. *Skin.* 371.

[So, a by-law, by the mayor and common council of *Exeter*, that no *butcher*, or other person, should, within the walls of the said city, slaughter any beast under pain to forfeit certain penalties therein mentioned, is good, being not in restraint of trade, but only a regulation of it; and other inhabitants are bound as well as the members of the corporation. *Cowp.* 270.]

[That brewers' drays should not be in the streets of *London* after eleven in the forenoon in summer, and one in winter. *Bosworth v. Hearne*, *H. 11 G. 2. Str.* 1085. *B. R. H.* 405. *Andr.* 91.]

That no silk-throwster use more than so many spindles in a week. *R. 1 Lev.* 229.

That no one shall be a broker, unless he be licensed and sworn. *Ray.* 294.

That no person shall be made free of a company till called at three meetings of the mayor and aldermen of a city, and the wardens and stewards of the companies in it, before his admittance, and approved by the majority, is good; it not being a restraint upon, but a regulation of trade. *Green v. Mayor of Durham*, *H. 30 G. 2. 1 B. M.* 127.]

[Such meeting, tho' not returned, shall be *intended* to have been duly holden; for otherwise the candidate might have pleaded that in excuse for his not being called and approved. *Ibid.*]

[If it is found on a traverse that the party was not called and approved *pursuant* to the by-law, it *implies* that the by-law was in being at that time. *Ibid.*]

That none shall take for journeyman any one not free of *London*. *Hard.* 56.

[That no member of the company of surgeons of *London* shall take an apprentice who does not understand *Latin*, to be examined and tried by one of the governors. *Rex v. Surgeons' Company*, *M.* 33 *G. 2. 2 B. M.* 892.]

That none shall unlade coals out of a barge, if he be not of the porters' company. *Semb.* 3 *Mod.* 193.

So, where a power to make by-laws is confirmed by parliament, or warranted by prescription, a by-law will be good, which would not be so, if founded upon the charter only: and therefore a by-law in *London*, that no one, not free of the city, shall use a trade by retail there, will be good; for the customs of *London* are confirmed by parliament. *R. 8 Co.* 125.

That no one shall be allowed as an hawker in *London*, without licence, &c. *Ray.* 294.

That no one shall use a trade in a burrough not free there, where the by-law is founded upon a custom to such intent, tho' the custom be not confirmed by parliament. *Adm. Lut.* 564. *Adm. Godb.* 254. 8 *Co.* 125. *a.* *Court div. Cart.* 69. 115.

[General restraints of trade are bad; particular restraints, either as to time or place, are good, if for a sufficient consideration. *London v. Fell*, *C. P. M.* 16 *G. 2. Willes*, 384.]

(B 4.) Tho' a Charge be imposed.

So, tho' a by-law impose a reasonable charge, it will be good, when he who pays it has a benefit by the by-law: as, if there be a by-law, that every burgess in *St. Alban's* pay a reasonable sum for building

building of the courts when the term was held there. *Semb. 1 Rol. 363. l. 50. 5 Co. 64. a. Vide post. (C 5.)*

Or, for cleaning the burrough upon the coming of the judges. *Adm. Mo. 580.*

Or, for his proportion of pontage, murage, &c. to be paid by the burrough. *D. Mo. 580.*

So, a by-law, that a burges shall make a feast at his election, is good. *R. 2 Cro. 555.*

That every one admitted to the livery in the vintners' company pay 31 *l.* 13 *s.* 4 *d.* when the custom warrants the payment of a reasonable sum for the dignity and charges of the company. *R. Ray. 446. Semb. 1 Sal. 349. 5 Mod. 319.*

(B 5.) Tho' there be no Notice.

So, a by-law will be good, tho' no notice of it be given to the party: as, if there be a by-law at the court of a manor, notice is not necessary; for all the tenants of the manor shall be intended to be consant. *R. Cro. Car. 498. 1 Rol. 365. l. 50.*

A by-law, that a sheriff chosen for London shall forfeit 400 *l.* upon refusal, unless he swears at the next hustings that he is not worth 10,000 *l.*, &c. notice need not be given of the election; for every freeman ought to take notice. *R. 5 Mod. 442. 1 Sal. 142. Carth. 484.*

[But a dissenter is allowed to object to the validity of his election, on account of his not having taken the sacrament according to the rites of the church of England within a year before his election, in bar to an action for the penalty. *Harrison v. Evans, Cowp. 393. in notis.*]

Tho' the liverymen only attend the election; for they represent the freemen. *1 Sal. 142.*

(C) What shall not be a good By-Law.

(C 1.) If it be not allowed by the *stat. 19 H. 7.*

BUT by the *stat. 15 H. 6. 6.* a corporation shall not make an ordinance to the diminution or disherison of the franchises of the king, or others, contrary to the common profit; or an ordinance of charge: but that is now expired. *1 Rol. 363. l. 10.*

So, by the *stat. 19 H. 7. 7.* no ordinance shall be made to the diminution or disherison of the prerogative of the king, or of others, or against the common profit, or to restrain a suit to the king, unless it be approved by the chancellor, treasurer, two chief justices, or three of them, or both the justices of assise, on pain of 40 *l.*

But this *stat.* extends only to guilds, fraternities, &c. not to cities, burroughs, &c. *Per att. quo W. 44.*

So, an ordinance not allowed according to the *stat. 19 H. 7. 7.* is not void; but it cannot be executed without being subject to the penalty of the *stat.* *1 Rol. 363. l. 37. Per att. quo W. 44. R. 11 Co. 54. b. Vide ante, (B 1.)*

(C 2.) If it extends to a Stranger.

So, a corporation, without authority of parliament, or an express prescription, cannot make a by-law which shall bind a stranger. *Per Curiam, 2 Vent. 33.* And

And therefore, a by-law by the university of *Oxford*, that every one, *privilegiatus vel non privilegiatus*, found in the street after nine at night, without a reasonable excuse, shall forfeit 40s., does not bind the townsmen. *Semb. 2 Vent. 33.*

So, a by-law, that any person elected into an office, who refuses, shall forfeit 10*l.*, will be void; for thereby a stranger elected shall forfeit. *R. 3 Lev. 294.*

And tho' the words are, *duly elected*, and the person elected was a burghers, it will not be cured. *R. 3 Lev. 294.*

So, a by-law, by the homage, or tenants of a manor, does not extend to persons who do not hold of the manor. *1 Rol. 366. l. 36. R. Sav. 74.*

So, a by-law by the corporation of butchers, that no one shall sell veal within the city, unless the kidneys are dressed as the kidneys of sheep, is void, as to a stranger. *R. 1 Bul. 11.*

So, a by-law by the corporation of *Trinity-House*, that every mariner, within 24 hours after anchorage in the *Thames*, but his gunpowder on shore, does not bind; because the corporation has no jurisdiction upon the *Thames*, &c. *Semb. 2 Jon. 145.*

So, a by-law by the corporation of horners, that none of the company buy horns within 24 miles of *London*, but of two persons by them appointed, is void; for they have not jurisdiction within 24 miles. *R. 3 Mod. 159.*

So, a by-law in *London*, that no one coming to the port of *London*, shall use any other than a city porter. *R. Sal. 143.*

A by-law in *Exeter*, that no person, not being a brother of the society of cordwainers there, shall use the trade of a shoemaker, &c. within the city or county of *Exeter*. *Bridg. 139.*

But, if a fraternity, &c. be allowed to take men of another trade, or strangers, into their fraternity, a by-law by them binds all of the fraternity, tho' strangers to the mystery. *Mo. 579. 586.*

So, a by law by a corporation, &c. binds a stranger within their precinct; as, a by-law for the regulation of common by the tenants of a manor, binds a stranger within the precinct of the manor. *2. Hob. 212. Semb. Cart. 179. 1 Sal. 193.*

So, a by-law in *London*, that no freeman, or stranger, sell cloth within the city before it be searched at *Blackwell-Hall*, is good against a stranger; for it is for an offence within the city. *R. 5 Co. 63. b.*

So, a by-law, that a man elected sheriff of *London* and *Middlesex* at *Guildhall*, forfeit, &c. if he refuse the office, is good, tho' *Middlesex* be out of *London*; for the office and election is there. *R. in B. R. Trin. 11 W. 3. Vanacker, 5 Mod. 441.*

So, where a by-law is made for prevention of fraud, or corruption, a stranger shall be bound. *Semb. 1 Bul. 12.*

As, that every foreigner who sells goods usually sold by weight within *London*, shall carry them to be weighed by the king's beam, maintained by the city. *R. 1 Lev. 15.*

[A corporation may enforce a custom by a by-law, imposing a penalty for breach of it; but it cannot give an action to a stranger to recover that penalty, but must sue for it themselves, or some one of them. *Bodwic v. Fennell, M. 22 G. 2: 1 Wilf. 233. Totterdell v. Glazby, T. 5 G. 2. 2 Wilf. 266.*]

(C 3.) In Restraint of Trade.

By the *ft.* 3 *H.* 7. 9. a by-law in *London*, that no freeman shall sell his wares at a fair, or market out of the city, was annulled. 1 *Rol.* 363. *l.* 25. *Vide ante*, (B 3.) *Vide Trade*, (D 2.)

By the *ft.* 12 *H.* 7. 6. a by-law by the merchant adventurers, that none sell or buy in the dominion of the duke of *Burgundy*, without their licence, was annulled. 1 *Rol.* 363. *l.* 10.

So, a by-law is void, that no one use his trade in such a town, who was not apprentice there at the same trade. *R. Mo.* 869. *R.* 1 *Rol.* 364. *l.* 20. *Hob.* 211.

Or, that no apprentice there use his trade till seven years afterwards. *R.* 1 *Rol.* 364. *l.* 12.

That he shall not use his trade there without the allowance of the corporation of taylors, or three of the master and wardens, or proof that he was an apprentice; for it does not appear what proof will be required, and therefore there may be a prohibition. *R.* 1 *Rol.* 364. *l.* 45. 11 *Co.* 53. 1 *Rol.* 4. *God.* 253. *Adm. Hob.* 211.

That he shall not use a trade in *London* unless he be free of such a company; for he has a liberty of any company. *R.* 5 *Mod.* 104, &c.

[A by-law made by a company in a corporation to restrain the number of apprentices to be taken by any of the members, is void. *Rex v. Coopers' Company Newcastle, E.* 38 *G.* 3. 7 *T. R.* 543.]

[A by-law made by the gun-makers' company, "that no member should sell the barrel of any hand-gun, &c. ready proved, to any person of the trade, not a member, in *London*, or within four miles; and that no member should strike his stamp or mark on the barrel of any person not a member of the company, &c. under a penalty of 10 s. for each offence," was holden bad, as being in restraint of trade; it not appearing from any thing set forth in the declaration that there was any adequate reason for these restraints, or any consideration to the persons restrained. *London v. Fell, C. P. M.* 16 *Geo.* 2. *Willes*, 384.]

[Under a general power to make by-laws, a by-law cannot be made to restrain trade. *Harrison v. Goodman, M.* 30 *G.* 2. 1 *B. M.* 12.]

That he shall not use a trade in a city, burrough, &c. unless he be free there, where there is no custom for it. *R. Lut.* 564. *R.* where the corporation was made within time of memory. 8 *Co.* 125. a. *Adm. Godb.* 253.

So, a by-law is void, that no merchant-taylor put his cloths to be dressed but to clothworkers of the same company; for this amounts to a monopoly. *R.* 1 *Rol.* 364. *l.* 35. 11 *Co.* 86.

Or, that he put one half of his cloths to them. *R. Mo.* 587. 591. 2 *Inst.* 47.

So, a by-law, that one shall not sell any sand, except what he takes out of the *Thames*, is void. *Ray.* 293. *Gob.* 106.

(C 4.) In Restraint of a Right.

So, a by-law for the total restraint of one's right, will be void: as, if a man be debarred the use of his land. *R. Sav.* 74. *Vide ante*, (B 2.)

If

If a commoner be excluded from the common. 3 *Leo.* 264.

So, a by-law, that a commoner shall put no steer upon the common above a year old, is void.

[A corporation by charter cannot make by-laws, contrary to the directions of the charter; as, if the charter directs an election to be by the mayor, jurats, and commonalty, they cannot restrict it to sixty seniors of the commonalty. *Rex v. Cutbush*, P. 8 G. 3. 4 *B.M.* 2204.]

[Or, to such of the commonalty as have served church-warden and overseer. *Rex v. Spencer*, H. 6 G. 3. 3 *B.M.* 1827.]

[A charter directed to the election of senior bailiff to be made by a majority of a select body, and it was holden that a by-law giving a casting vote to the presiding officer in case of an equality of voices, was bad. *Rex v. Ginever*, T. 36 G. 3. 6 *T.R.* 732.]

(C 5.) To charge the Subject.

By the *ft.* 34 *Ed.* 1. *de tallagio non concedendo*, no tallage, or aid, shall be laid, or levied in our realm, by us, or our heirs, without the assent of the bishops, barons, knights, and other freemen of our realm. *Vide in Parliament*, (H 9, &c.) *Vide ante*, (B 4.)

And therefore, every charge, levied upon the people without assent of parliament, will be void. 2 *Inst.* 60, 61.

If a by-law impose a charge, without an apparent benefit to the party, it will be void: as, a by-law, that all coming to market pay 6*d.* *per cart*, &c. for standing there. *Semb. in quo W. per Treby*, 29. *per Att.* 42.

So, a by-law, that all carmen, who are licensed in *London*, pay 20*s.* for a fine upon admittance, and 17*s.* 6*d.* *per annum* to an hospital, is void. *R. Ray.* 328.

(C 6.) If it be unreasonable.

So, a by-law, not reasonable in any respect, will be void.

So, a by-law, not good, shall not be allowed, because it is approved according to the *ft.* 19 *H.* 7. 7. *R.* 11 *Co.* 54. b. ●

[A by-law cannot impose an oath, nor empower any person to administer it. *Rex v. Dean and Chapter of Dublin*, M. 9 G. Str. 536.]

[So, a corporation created by *letters patent*, with a power of making by-laws, cannot make any laws to incur a forfeiture.]

[So, neither can a corporation created by *act of parliament*, unless such power be expressly given. 1 *Term Rep.* 118.]

[Nor, shall such by-law be allowed, tho' confirmed by *ft.* 19 *H.* 7. c. 7. *Id. ibid.*]

(C 7.) A By-Law, void in Part, is void for the Whole.

A by-law being entire, if it be unreasonable in any particular, shall be void for the whole: as, if the penalty be unreasonable.

Or, to be levied by imprisonment, sale, &c.

Or, to be levied by distress and sale; it will not be good for the distress. *R.* 2 *Vent.* 183.

(D) What Remedy shall be allowed upon a By-Law.

(D 1.) By Debt, &c.

A By-law may enact a penalty to be recovered by debt, &c. R. 5 Co. 64. a. 1 Rol. 366. l. 46.

So, it may ordain that the chamberlain of London shall have debt for it. 5 Co. 63. b. 1 Rol. 366. l. 50. Mo. 403.

So, if the by-law does not mention how the penalty shall be recovered, debt lies upon it. 1 Rol. 366. l. 48.

So, an action upon the case lies upon an *assumpsit*, for the penalty of a by-law. R. 2 Lev. 252. Clift. 901, 902.

So, a by-law, that the penalty shall be recovered only in debt within the court of the city, &c. in which no effoign, &c. is good. R. 1 Lev. 15.

[The master, wardens, and commonalty of a company, cannot sue for a penalty forfeited to the master and wardens, to the use of the master, wardens, and company. *Company of Felt-Makers v. Davis*, C. P. M. 38 Geo. 3. 1 Bos. & Pull. Rep. 98.]

[A by-law, made by the gun-makers' company, inflicted a penalty, half to the use of the poor of the company, and half to the use of the discoveror, without saying who was to sue for it; whether the company may not sue for the penalty? Qu. *London v. Fell*, C. P. M. 16 G. 2. Willes, 384.]

[In an action for a penalty for breach of a by-law, whether it should not be positively stated that the defendant was subject to the by-law when he did the act complained of? Qu. *Ibid.*]

[And whether it be sufficient if it be stated to have been done on a day (after a *viz.*) after he was subject to the by-law, as it appears on other parts of the declaration. Qu. *Ibid.*]

[But a by-law, that none but *freemen* shall keep shop, and which confines the action for the penalty to the portmote court, where none but the sheriff, or coroner, (who must be freemen,) can array a jury, is bad. 3 Bur. 1847.]

[For, tho', in the regulation of its own members, a corporation may make by-laws, and enforce the observance of them in its own courts, because every member is bound by the jurisdiction into which he voluntarily enters; yet it is contrary to the fundamental principles of law, that corporations should try their *own* suits against *strangers*. Per Lord Mansfield, 3 Bur. 1858]

(D 2.) By Distress, &c.

So, a by-law may enact, that the penalty shall be recovered, or levied by distress. 5 Co. 64. Adm. 3 Lev. 281. 1 Rol. 366. l. 42.

And tho' it do not say what beasts shall be distrained, it will be good; for it shall be intended the beasts of the offender. R. Dy. 322. a. 1 Rol. 366. l. 10.

But a penalty cannot be levied by distress, without a prescription to levy, or the express words of the by-law, that it shall be so levied. 1 Rol. 367. l. 5.

So, a penalty cannot be imposed upon a town, and levied upon a particular person, who cannot have contribution. R. 3 Lev. 49.

So, a by-law, that the offender shall be disfranchised, may be good. D. Mo. 412.

(E) What not.

(E 1.) By Imprisonment.

BUT a by-law, that the party, unless he obey, shall be imprisoned, is void, being contrary to *Magna Charta*. *R. 5 Co. 64. a. 1 Rol. 363. l. 45. R. Mo. 411. D. 8 Co. 127. b. Adm. Sal. 349. Jon. 162.*

Or, that he shall forfeit 40 s., and for non-payment shall be imprisoned. *R. 1 Rol. 364. l. 5.*

But by custom, a corporation may have power to commit, tho' not by charter, or by law. *1 Sal. 349.*

So, by custom, a by-law, with imprisonment for non-performance, may be good. *Semb. 1 Sal. 397.*

So, by the custom of *London*, one may be committed for refusal to be upon the livery. *R. 2 Lev. 200.*

(E 2.) By Sale, &c.

So, a by-law, that a penalty be levied by distress and sale of the goods of the offender, is void. *R. 8 Co. 127. b. R. 2 Vent. 183. 3 Lev. 282.*

Tho' the officer who levies only distrains the goods, and does not sell them. *2 Vent. 183.*

So, that a bond be given for performance. *Semb. Ray. 227.*

So, a by-law, that the party, unless he pay, shall forfeit his goods, is void. *R. 8 Co. 127. b. D. 2 Vent. 183.*

Or, that his bond, or covenant against the by-law, shall be void. *Semb. Mo. 411.*

C A L E N D A R.

Vide Temps, (B 2.)

C A N O N S.

(A) What is the Use of the Civil Law.

IN *England* use is sometimes made of the civil and of the ecclesiastical, or common law. *Co. L. 11. b.*

Tempore Romanorum, viz. ab anno Christi 50, cum Claudius subjugavit Britanniae partem, usque annum circiter 410, cum Alaricus tempore Honorii Romam cepit, (annos circiter 360,) the civil or imperial law was in use in Britain. Seld. Diff. ad. Fl. 479, 480.

And afterwards it was used for direction, where the law of *England* was silent; or for confirmation, where it was consonant. *Seld. Diff. 464. 472.*

(B 1.) The Use of the Canon Law.

T*Empore Regis Stephani anno Dom. 1150, decretals were published for the government of the clergy. Dav. 70. a.*

Afterwards the pope attempted to impose rogations; viz. ordinances

nances for days of abstinence of the laity, as well as of the clergy.
Dav. 70. a.

Anno 1230, tempore Hen. 3. other decretals for the laity, as well as the clergy, were published. *Dav. 70. a.*

Decretals were first introduced in *England anno 25 Ed. 1.* *Dav. 71. b.*

(B 2.) What shall be so called.

Jus canonicum est, quod ab ecclesia, aut viris ecclesiasticis institutum est.
Lind. 76. Vide Jus Canonicum.

These were collected in a book, viz. *Codex Canonum*, which at first contained 131 canons, afterwards 207, made by several council, to which afterwards were added 85 apostolical canons, and several by other councils, with canonical epistles by divers popes. Afterwards the church of *Rome* made one *codex canonum* which contained the apostolical canons, the canons of the 12 councils, and the decrees of 14 popes. *Ayl. Int. 9, 10, &c.*

The body of the canon law now used, being confirmed by pope Gregory 13th, comprehends the *decretum*, the *decretals*, the 6th book of *Decretals*, the *Clementines*, the *Extravagants* and *common decretals*, and the 7th book of *Decretals*. *Ayl. Int. 9. 19. 21. 25, 26, &c.*

(C) What Canons bind.

AS to the power of making canons, *vide in Convocation (E).*

All canons allowed and used in *England*, become part of the ecclesiastical laws of *England*. *Dav. 70. b. Vide in Prerogative, (D 10.)*

So, all canons or constitutions made in a convocation, or provincial synod within the realm. *Dav. 72. b. R. Mo. 783.*

By the *st. 25 H. 8. 19.* repealed by the *st. 1 & 2 Ph. & M. 8.* and afterwards revived by the *st. 1 Eliz. 1.* it was provided, that such canons, constitutions, ordinances, and synodals provincial already made, which be not contrariant to the laws, statutes, and customs of the realm, nor to the hurt of the king's prerogative, shall be used as before the said act, till otherwise ordered by 32 persons to be appointed according to the said act.

And by the same statute, the king may nominate and assign at his pleasure 32 persons of his subjects, 16 of the clergy, and 16 of the temporality of upper and nether house of parliament, who shall have power to examine canons, &c. before made, and such as the king and the major part of them shall deem worthy to be continued shall be obeyed, so that the king's assent under the great seal be first had to the same, and the residue shall be void.

And such nomination was allowed by the *st. 27 H. 8. 15.* the *st. 35 H. 8. 16.* and the *st. 3 Ed. 6. 11.*

But there never was any such nomination by *H. 8.* or *Ed. 6.*, and therefore all canons and constitutions here received and allowed before that time, are now the ecclesiastical laws of the realm. *Wat. 22.*

And all persons are bound by them; for they are part of the constitution. *Wat. 23.*

And

And the common law courts will take notice of them as such. *Wat.* 23.

Canons made 3 *Jac.* by the convocation with the king's licence, and confirmed by the king, bind without confirmation by parliament. 2 *Vent.* 44.

† They bind the clergy, but not the laity, unless they are confirmed by parliament. *Carth.* 485.

Yet it was resolved in the House of Commons, 15th *December* 1640, *nemine contradicente*, that the convocation, &c. hath no power to make canons to bind the clergy or laity, without the common consent of parliament. 3 *Rush.* 1365.

But a canon shall not be allowed, contrary to the common law.

2 *Inst.* 599. 647. 653. *R.* 12 *Co.* 72. *per Vau.* 2 *Vent.* 44.

Or, contrary to the king's prerogative, or the custom of the realm: 2 *Inst.* 653. 658. *R.* 12 *Co.* 72.

Or, contrary to an act of parliament. 2 *Inst.* 658. *R.* 12 *Co.* 72.

And therefore by the *st.* 25 *H.* 8. 19. it is declared, *that a canon contrary to the king's prerogative, the law, statutes, or custom of the realm, is of no force*; and this was only declaratory of the common law. 2 *Inst.* 658.

So, canons established in convocation by the king's licence, do not bind laymen, but only ecclesiastical persons; for the laity are not represented in a convocation. *Sal.* 412. *D.* that they bind the whole kingdom. *Mo.* 783. They do not bind the temporality. 12 *Co.* 73.

So, they bind only in ecclesiastical matters. *Semb. Mo.* 783. 12 *Co.* 73.

So, canons established, &c. do not bind the laity. *Per Tyrrell*, 2 *Vent.* 43. But *per Vau.* in ecclesiastical matters they bind laicks and ecclesiastics. 2 *Vent.* 44.

Lay persons are not within the words of the 62. 101, 102, 103, and 104th canons of 1603.

The canons of 1603, *proprio vigore*, (for some are only declaratory of the ancient canon law,) do not bind the laity. *Per Hardwicke C. J.* *et tot. Cur. on great consideration.* *Middleton v. Croft*, *M.* 10 *G.* 2. *Str.* 1056. *B. R.* *H.* 326.

So, a canon that has never been received in *England*, is not part of the law ecclesiastical. *Kel.* 181. *b.* 184. *Latch*, 191. 2 *Inst.* 653.

And by the *st.* 25 *H.* 8. 21. it is recited, that *England* is free from subjection to any man's laws but such as have been made within the same, or by sufferance of the king, the people by their own consent, and long use, have bound themselves to the observance of, not as to foreign laws, but as to the ancient laws of this realm, originally established within the same, by such sufferance, consent and custom, and not otherwise.

So, the interpretation, execution, and dispensation of all canons allowed within *England*, belong to the king and his ministers. *Dav.* 70. *b.* *Vide Prerogative*, (D 11.)

CAPACITY.

(A) Who have Capacity to purchase.

(A 1.) Persons Natural.

PERSONS capable to purchase are natural or politic. *Co. L. 2. a.*

All persons natural have a capacity to take by purchase.

Persons deformed, if they have human shape. *Co. L. 3. b.*

A deaf, dumb, and blind person. *Co. L. 3. b.*

An idiot, or a man of non-sane memory may purchase, without the consent of any other. *Co. L. 2. b. 3. b.*

And he himself can never avoid the purchase. *Co. L. 2. b.*

So, if he recover his sanity and afterwards agree to the purchase, his heir shall never avoid it. *Co. L. 2. b.*

But if he dies in his insanity, or recovers, and dies before agreement to the purchase, his heir may agree to, or waive the estate, without cause alleged. *Co. L. 2. b.*

A leper may purchase. *Co. L. 3. b.*

So, an hermaphrodite, according to the prevailing sex. *Co. L. 3. a.*

A bastard, by his name of reputation. *Co. L. 3. b. Vide Bastard*

(E).

A man convicted or attainted of treason or felony, may purchase for the benefit of the king. *Co. L. 2. b.*

So, a *feme-covert* may take by purchase, till her husband disagree, or she after her husband's death waive it. *Vide Baron and Feme (P 2.—R).*

So, a villein may purchase; but the lord afterwards may enter. *Co. L. 2. b.*

So, an alien may purchase for the benefit of the king, or an house for his habitation. *Co. L. 2. b. Vide in Alien, (C 2, 3.)*

So, an infant may purchase without the consent of another; for it shall be intended for his benefit. *Co. L. 2. b.*

But after his full age, he may agree to it, or waive it at his pleasure. *Co. L. 2. b.*

And if he die before agreement, after his full age, his heir may agree to, or waive it. *Co. L. 2. b.*

So now, a monk, nun, &c. may purchase; for they were not disabled by the common law; and the canon law, whereby their disability incurs, is here abolished. 1 *Sal.* 162.

(A 2.) Politic.

A body politic is sole or aggregate. *Co. L. 2. a. Vide Franchises, (F 1, &c.)*

A corporation aggregate consists of many persons, all capable of purchasing, or one capable and the others incapable. *Co. L. 2. a.*

A corporation sole, as the king, a bishop, a parson, &c. may purchase to him and his successors. *Co. L. 250. a.*

So, a corporation aggregate, where all are capable; as, a mayor and commonalty. *Vide Co. L. 250. a.*

Dean and chapter.

So, where one is capable, and others incapable; as, an abbot may purchase without the consent of the convent, and cannot afterwards avoid it. *Co. L. 2. b.*

But his successor for good cause, and not otherwise, may waive the purchase. *Co. L. 2. b.*

As, if the rent reserved exceed the value of the estate. *Co. L. 2. b.*

(B 1.) Who not.

BUT a monster, who has not an human form, cannot purchase. *Co. L. 3. b.*

Nor, a man professed in religion, for he is dead in law; as, a monk, friar, nun, &c. except where they are sovereigns of an house of religion. *Co. L. 3. b. 132. b.*

So, a community not incorporated cannot purchase; as, the parishioners or inhabitants of *D.* *Co. L. 3. a.*

The commoners in such a waste cannot take by grant of the lord. *Co. L. 3. a.*

So, churchwardens cannot purchase lands (but goods only). *Co. L. 3. a.*

(B 2.) By the Statute of *Mortmain*.

(B 2.) *What is mortmain.*] By the *stat. 7 Ed. 1. de religiosis*, *Si quis religiosus, vel alius*, (for *Magna Charta*, 9 *H.* 3. 36. extends only to a religious house which purchases, 2 *Inst.* 75.) purchase lands or tenements in fee, the lord of whom the lands are holden may enter within a year; or, if he be negligent, the next lord within half a year; or, if he neglect, the king may enter.

So, by the *stat. W. 2. 13 Ed. 1. 32.* if he obtain a recovery by collusion. 2 *Inst.* 429.

And by the *stat. W. 15 R. 2. 5.* if there be a feoffment to the use of such an one.

And these statutes extend to every corporation sole or aggregate, ecclesiastical or temporal. *Co. L. 2. b. 2 Inst.* 75.

If lands are granted to them upon an exchange. *Kit.* 39. *b.* *F. N. B.* 223. *E. F.*

If an advowson be appropriated to them. *F. N. B.* 223. *H. Kit.* 39. *a.*

Or, a rent-charge granted. *F. N. B.* 223. *B. Kit.* 38. *b.* 139. *b.*

So, if lands are devised to them. *F. N. B.* 224. *F.*

So, if a bishop enter upon land purchased by his villein, it is *mortmain*. *F. N. B.* 224. *b.* *Kit.* 38. *b.*

If a bishop or other corporation alien to another and his successors. *F. N. B.* 222. *D. Kit.* 38. *b.*

By the *stat. 23 H. 8. 10.* feoffments, fines, wills, &c. to the use of the parish-church, chapel, guilds, commonalties, &c. or to find obits, priests, &c. which are to have continuance above 20 years, shall be void.

If there be an alienation in *mortmain* of things not held, as of a villein, rent-charge, common, advowson, &c. the king shall have them presently. *Co. L. 2. b.*

(B 3.) *What is not mortmain.*] But if an annuity be granted to a corporation,

corporation, it is not *mortmain*; for that charges the person only. *Co. L. 2. b.*

So, if goods and chattels are granted. *Kit. 139. b.*

So, a grant of a distress in other lands for an antient rent. *2. F. N. B. 224. G. Kit. 39. b.*

A release of rent to the tenant. *Kit. 39. a.*

Recovery in value upon *voucher*. *Kit. 39. b.*

So, the king by his licence may dispense with an alienation in *mortmain*. *Kit. 39. b.*

And before such licence an *ad quod damnum* antiently issued; but is not now used. *F. N. B. 222. D. Vide ff. 27 Ed. 1.*

But such licence does not bind the other lords. *Vide F. N. B. 222. D. Kit. 139. a. b.*

And therefore, it was enacted by the *ff. 7 & 8 W. 3. 37.* that the king may licence to alien, or take in *mortmain*.

So, a devise to a charitable use within the *ff. 43 Eliz.* is not *mortmain*.

Tho' the devise be to a college. *R. 1 Lev. 284. [Vide Uses, N. 13.]*

(B 4.) By what Names they shall purchase.

(B 4.) *Persons natural.*] A man regularly ought to purchase by his name of baptism, and his surname. *Co. L. 3. a.*

But if he purchase by his name of confirmation, it is sufficient. *Co. L. 3. a.* and that ought to be used. *1 Brownl. 47.*

So, if there be a certain description of the person who purchases, altho' his Christian and surname are omitted, it is sufficient. *Co. L. 3. a.*

As, if a grant be to the earl of Pembroke, the bishop of London, &c. by his name of dignity; for the person is certain. *Co. L. 3. a.*

To the Chester herald, &c. *R. 2 Rol. 44. l. 15.*

To the wife of B. *Co. L. 3. a.*

Primo aut secundo filio, seniori puero, natu minimo, omnibus filiis, filiabus, liberis, exitibus, aut rectis heredibus de B. *Co. L. 3. a. R. Mo. 104.*

And *primo puero*, may be to the first child, tho' it be a female, if it be so explained by any other writing. *R. Mo. 104.*

If it be to the issue male, his first issue male shall take. *R. 3 Lev. 433.*

So, tho' his Christian name be added, and mistaken. *Co. L. 3. a.*

So, if there be a limitation to the heir male of the body of his grandfather, the heir male shall take, tho' there be an heir general alive; for the description is sufficient to make him take by descent, and therefore it shall be well by purchase. *R. 2 Ver. 730.*

But if there be a description of a person certain in *esse*, and there is no such one in *rerum natura*, a person who afterwards answers to the description cannot take; as, if a remainder be limited to B., the wife of A., tho' A. afterwards marry B. before the particular estate ends, she cannot take. *Mo. 104.*

Vide Fait, (E 3.)

(B 5.) *Politic.*] So, a corporation regularly ought to purchase by its name of incorporation; and therefore, a grant by or to the master and

and wardens of cooks in London, whereas they are named *masters* and *governors*, will be void. R. Pl. Com. 537. b.

The master of St. Peter's, where the name is, the master of St. Peter's and St. Paul's. Bro. Corporation, 8.

The provost, &c. of the house of N., where it is a chauntry. Bro. Corporation, 21, 22.

The dean and chapter *cathedralis ecclesiæ sanctæ & individue Trinitatis* N. omitting *ex fundatione reg.* Ed. 6. Adm. 3 Co. 75. 2 And. 166, 167. Jon. 170.

Collegium regule de Eton, where the name is *collegium beatæ Mariæ de Eton.* Dy. 150. a. 1 And. 23. Mo. 13.

The dean and canons *liberæ capellæ de W.* where the name is, the dean and canons *capellæ St. Geo. Martyr de W.* 1 Leo. 162.

The master *collegii de Merton in Oxonia*, where the name is *Collegium scholarium de M. in universitate Oxoniæ.* 1 Leo. 162. Cont. Mo. 266.

The presbiters and chaplains of St. Stephen's, where the name is, the dean, canons, and vicars of St. Stephen's. 2 And. 166.

The provost and scholars of Queen's college, in the university of Oxford, where the name is, the provost and scholars *aulæ reginæ de Oxford.* Dub. Lane, 15. 33.

Yet, an addition to a name does not avoid the purchase, but shall be rejected: as, if the master and brethren are named, the master and brethren *sive socii.* R. 11 Co. 20. a. Bro. Corporation, 8. 62.

If the master, &c. of the mystery of cooks are named, of the craft and mystery. Pl. Com. 537. b.

If the hospital H. 7. regis Angliæ be named the hospital H. 7. nuper regis. 1 R. Leo. 159.

If *collegium Christi in Oxonia* be named *Collegium Christi in academia Oxoniæ.* R. Mo. 361. Vide Mo. 865. Sav. 129. R. Poph. 56.

If any ornament to a name be added or omitted. Poph. 156, 7.

Nor, an immaterial variation: as, a lease by the dean and chapter of Exeter, instead of, in Exeter. R. 2 Leo. 97. 2 Rol. 42. l. 45.

By the master *domus sive collegii*, instead of, *domus sive hospitalis*; for a college and hospital are the same. Semb. 1 Leo. 215.

Collegii Trinitatis, instead of, *collegii sanctæ & individue Trinitatis.* 1 Leo. 161.

The dean and chapter *ecclesiæ de Peterborough*, instead of, *ecclesiæ Petriburgensis.* 1 Leo. 159. Cont. 1 And. 23.

Magister collegii, instead of, *magister aulæ*, &c. R. 11 Co. 22. b.

Magister hospitalis H. 7. de Savoy & *capellanus prædicti hospitalis*, instead of, *magister & capellanus hospitalis* H. 7. de Savoy. R. 1 Leo. 159. Acc. Dy. 278. Mo. 865.

The minister of God of the poor-house of D., instead of, the minister of the poor's house of God of D. Dub. 2 And. 117. R. Mo. 865.

Major & ballivi villa de D. & *burgenses ejusdem villæ*, where the name is *major & burgenses villa de D.* R. 1 Rol. 119.

The dean and chapter *ecclesiæ Petriburgensis*, instead of, *sancti Petriburgensis.* Mo. 14. Cont. 1 And. 23.

So, if a statute or testament give a certain description it is sufficient, tho' the name be not observed: as, if advowsons of recusants are given to the university of Cambridge. R. 10 Co. 57. b. 11 Co. 21. b. 2 Leo. 165.

So, in grants and conveyances, it is sufficient, if the same name *in re & sensu* be used, tho' not *in verbis*. R. 10 Co. 124.

So, by a verdict or an averment, a misnomer may be aided. 10 Co. 125. b.

So, if an ancient corporation be incorporated *de novo*, with an addition to the name; a lease, &c. by the ancient name, will be good. R. Jan. 167.

(C) Who have Capacity to grant.

EVERY person being a natural and lawful subject, of sane memory and full age, may make a feoffment, grant, lease, &c. Co. L. 42. b. *Vide Grant*, (A 1.)

Tho' he be a bastard. Co. L. 42. b.

Convict of heresy. Co. L. 42. b.

A leper removed by the king's writ *a societate hominum*. Co. L. 42. b.

Tho' he be deaf, dumb, or blind, if he has good sanity and discretion. Co. L. 42. b.

(D) Who not.

(D 1.) A man professed.

BUT a person professed in religion, (who is *civiliter mortuus*;) as a monk, friar, canon, &c. cannot make a grant; for his grant shall be void.

Yet the sovereign of an house of religion, as an abbot, prior, &c. may make a grant, &c. *Vide Co. L. 132. b.*

So, may a monk, friar, &c. in the name, and by the assent of his sovereign.

Or, as a farmer of the king, in respect of his farm. *Vide Co. L. 132. b.*

Vide Abatement, (E 5.)

(D 2.) A Feme-Covert.

So, a grant by a *feme-covert*, without the assent of her husband, will be void. *Vide Baron and Feme* (Q).

Yet, a fine or common recovery of her own land, will be good, till it be avoided by her husband. *Vide Baron and Feme*, (P 1.)

So, a grant *en autre droit*, as executrix. *Vide Baron and Feme*, (P 3.)

So, if a woman make a grant when sole, and deliver the deed as an escrow, to be her deed upon conditions performed, and before the conditions performed she takes husband, and then the conditions are performed, it will be good; for after performance it has relation to the delivery. *Per. Grant. 9.*

So, if a *feme-covert* deliver a deed when covert, and after the death of her husband deliver it *de novo*; it shall be good by the second delivery; for the first delivery was entirely void. 2 Rol. 26. l. 3.

Vide Fait, (A 3.—B 5.)

(D 3.) An Infant.

So, a grant by an infant by deed will be void, if it seems to his prejudice. *Vide Infant*, (C 2.)

So, if the grant takes effect by livery from his hand, or seems to his advantage, yet it is voidable, and may be avoided by him or his heirs. *Vide Infant*, (C 3, &c.)

(D 4.) A Man insensible.

So, a man who has no understanding; as, if he be dumb, deaf, and blind from his birth, has not a capacity to grant, but his grant will be void. *Per. Grant.* 25.

(D 5.) A Man non-sane.

So, a man of non-sane memory has not a capacity to make a grant that shall bind his heir, or any other, besides himself. *Vide Idiot*, (C—D 1, &c.)

And therefore, if an idiot, lunatic, &c. make a feoffment, grant, or gift, &c. his heir shall avoid it. *Vide Per. Grant.* 21.

So, if he make a feoffment with a letter of attorney to make livery when non-sane, and afterwards he comes to a good memory, and then livery is made without any other assent; his heir shall avoid it. *Per. Grant.* 23.

But a man non-sane cannot avoid his grant, &c. during his life; for he cannot disavow himself. *Per. Grant.* 21.

So, if the grant be by matter of record, as by fine, &c. his heir shall not avoid it. *Per. Grant.* 24.

(D 6.) Attainted.

So, a person attainted of treason or felony has not a capacity to make a grant that shall bind the king, or the lord of whom the lands are held. *Vide Per. Grant.* 26.

But a grant, by a person attainted binds himself and his heirs. *Vide Per. Grant.* 26.

(D 7.) Head of a Corporation.

So, the head of a corporation aggregate has not a capacity to bind the corporation by his grant, without assent of the community under the common seal; as, if a mayor make a feoffment, or grant of land, or a grant of a rent, &c. out of land, without assent of the commonalty under the common seal, it will be void. *Vide Per. Grant.* 31.

So, the master of an hospital or college, without assent of the brethren. *Vide Per. Grant.* 31.

So, a grant by the head of a corporation sole binds only himself, but not his successor: as, a grant by an abbot, prior, &c. without assent of the convent. *Vide Per. Grant.* 31.

By a bishop without assent of the dean and chapter.

By a dean, without the assent of the chapter. *Vide Per. Grant.* 31, 32.

Who may sue and be sued, and who not.

Vide Action, (B 1, &c.—C 1, &c.)—*Abatement*, (E 1, &c.—F 1, &c.)

Who may devise, and take by Devise, and who not.

Vide Devise (G—H 1, &c.—I—K).

Who may marry, and who not.

Vide Baron and Feme, (B 1, &c.)

C A P E.

Grand Cape. *Vide Process*, (D 4.)

Petit Cape. *Vide Process*, (D 5.)

C A P I A S.

Vide Pleader, (2 W 3.)

Capias ad Satisfaciendum.

Vide Execution, (C 9, &c.)—*Bail*, (R 4.)

Capias pro Fine.

Vide Execution, (B 1, 2.)

Capias si Laicus.

Vide Statute Staple, (D 4.)

Capias Utlagatum.

Vide Pleader, (2 W 6.)—*Utlagary*—*Wales*, (B 2.)

Testatum Capias.

Vide Process, (E 7.)

C A P I A T U R.

Vide Leet, (O 7, 8.)

C A R R I E R.

Vide Action upon the Case for Negligence, (C 1, &c.)

C A S E.

Vide Action upon the Case.

CASTLE.

(A) Castle-guard.

AID for the keeping of a castle continues, tho' the castle be destroyed. *R. Mo. 1.*

CASU PROVISO.

Writ of Entry in Casu Provifo.

Vide Dum fuit infra Ætatem (D).

CASU CONSIMILI.

Writ of Entry in Consimili Casu.

Vide Dum fuit infra Ætatem (E).

CASUAL PROFITS.

Vide Prærogative, (D 49, 50.)

CATHEDRAL.

Vide Cemetery, (A 3.)—Eglise (B).

CATTLE.

Vide Dismes, (H 5, &c.)

CAUSE OF ACTION.

Vide Abatement, (G 4, &c.—H 24.)—Action, (E—F—G—I).

CAUTION.

Vide Admiralty, (E 19.)—Bail (D).

CEMETERY.

(A 1.) Church-yard.

THE church-yard is, *totus fundus, qui infra clausuram ipsius continetur.* *Lind. 267. v. cæmeteriis.*

The church-yard, *circa ecclesiam majorem 40 passus continere debet, circa minorem 30 passus.* *Lind. 253. ver. Claus. Cæmet.*

(A 2.)

(A 2.) To whom the Profits belong.

The soil and profits of the church and church-yard belong to the parson. *Vide Esglise, (G 1.)*

Or, to the vicar. *Vide Ecclesiastical Persons, (C 14.)*

And the parson may make a lease of the church-yard.

If he lease his parsonage, the church and church-yard pass.

If any cut corn or trees there growing, trespass lies by the parson, or his lessee.

[And where the parson libelled in the spiritual court for cutting elms in the church-yard, the defendant obtained a prohibition on suggestion that they grew on his freehold. 1 *Ld. Raym.* 212.]

By usage in *London*, the churchwardens take the money for burying in the church or church-yard, and the parson has nothing but in the chancel. 2 *Sbo.* 184.

So, the inclosure of the church-yard belongs to the parishioners.

Vide Prohibition, (G 4.)

(A 3.) What Privileges belong to the Church-Yard.

Cæmeterium gaudet eodem privilegio, quo ecclesia. Lind. 256. v. *Cæmeterio*, 270.

And therefore, before sanctuary was taken away, churches and church-yards had the privilege of sanctuary. *Vide st.* 32 *H.* 8. 12.

By the *st.* of *Wint.* 13 *Ed.* 1. 6. fairs and markets shall not be kept in church-yards, for the honour of the church.

By a constitution at *Oxford* anno *Lind.* 270. *Judicium sanguinis, (i. e. causa per judices seculares de effusione sanguinis aut corporali pœnâ,) ne tractetur in ecclesia, aut cæmeterio.*

So, by the 88th canon, anno 1603, the churchwardens and their assistants shall suffer no plays, feasts, banquets, drinkings, temporal courts, or leets, lay-juries, musters, or other profane usage in the church or church-yard.

So, by the *st.* 5 *Ed.* 6. 4. if any by words only quarrel, chide, or brawl in the church or church-yard, the ordinary on proof by two witnesses may suspend him; if lay, *ab ingressu ecclesiæ*; if clerk, *ab officio*, as long as he thinks meet.

If any smite, or lay violent hands on another, he shall be *ipso facto* excommunicate.

If any maliciously strike with a weapon, or draw a weapon to strike in the church or church-yard, and be convicted by verdict, confession, or two witnesses before the justices of assize, *oyer and terminer*, or the peace, he shall lose one of his ears: or, if none, be stigmatized on the cheek with an hot iron with the letter *F*, and besides stand *ipso facto* excommunicate.

[The ecclesiastical court has jurisdiction to give sentence of excommunication; and there must be a sentence declaratory at least, for striking in a church-yard. *Bilson v. Chapman, H.* 9 *G.* 2. *B. R. H.* 190.]

[And this may be done without any prior conviction. *Ibid.*]

[Unless on the third clause of striking with, or drawing a weapon, and there a temporal punishment (the loss of an ear) being inflicted, and the excommunication and accumulated punishment, a prior conviction is requisite. *Ibid.*]

Cathedral churches are within this statute, and church-yards which belong to them. *R. Cro. El. 224. 1 Leo. 248.*

So, it shall be within the statute, if any smite or draw a weapon to smite, &c. in his own defence. *Vide Noy, 171.*

But the indictment must say, *quod malitiose percussit, or extraxit cum intentione ad percutiendum.* *R. Noy, 171, 2.*

So, he shall not be excommunicated, till the conviction transmitted to the ordinary, and sentence upon it, tho' the statute says, he shall be *ipso facto* excommunicated. *Dub. Dy. 275. b. But acc. in marg. R. Cro. Car. El. 912. [Vide supra, B. R. H. contra.]*

Till the conviction transmitted; but that is sufficient without sentence upon it. *R. 1 Vent. 146.*

(B) Burial.

In what Place it shall be.

BURIAL was the usual character of a parochial church. *Seld. de Dec. c. 9. sect. 4. Vide Esgliffe (C).*

And therefore, every person (who may have Christian burial) may have burial in the church-yard where he dies, by the general custom of England.

And that, without any fee for breaking up the soil. *R. 1 Sal. 334. [Andrews v. Cawthorne, C. P. H. 18 Geo. 2. Willes, 536.]*

[It may be due by custom in any particular parish. *Ibid.*]

[The burial fees in *St. George's, Bloomsbury*, are directed by *stat. 3 Geo. 2. c. 9.* to be fixed by certain commissioners. *Ibid.*]

Tho' the church-yard be in a city, where anciently no burial was allowed without the king's licence.

So, by the canon, *ne cui pro pecunia degenetur sepultura, sed si quid devotione fidelium consuetum fuerit erogari, volumus per ordinarium loci ecclesiis iussitiam fieri.* *Lind. 278, 279.*

And therefore, *in ecclesia vel cæmeterio, pro sepulturâ nihil exigere debet, nec pro officio sepulture.* *Lind. 278.*

So, tho' by the canon, *Laicus non sepeliatur in ecclesia, nisi in cæmeterio.*

Yet by the custom of England, every one (who shall have Christian burial) may have burial in the common part of the church or chancel, paying the usual fee to the parson for breaking up the soil. *Vide Esgliffe, (G 1.)*

The usual fee is *3s. 4d.* in the church; *6s. 8d.* in the chancel.

Or, by custom, it may be more. *1 Sal. 334. 2 Keb. 778. 3 Keb. 523.*

So, by custom the fee shall be paid to the churchwardens, tho' of common right it belongs to the parson.

So, a man may prescribe, that he is tenant of an ancient messuage, and ought to have separate burial in such a vault within the church.

Or, in such an isle, or the quire.

And if he be disturbed, he may have an action upon the case. *2 Cro. 606.*

[But a custom, that every parishioner has a right to bury his dead relations in the church-yard, as near to their ancestors as possible, is bad. *Fryer v. Johnson, M. 29 G. 2. 2 Wils. 28.*]

So, tho' by the canon, a man shall be intombed, *ubi decimas persolvebat vivus.*

Yet

Yet he may by his will appoint his burial at such a monastery, &c. as he pleases. *Seld. de Dec. c. 9. sect. 4.*

And if the burial be out of the parish where he died, the parson of the parish where he died cannot prescribe for a fee for his funeral, unless he was a parishioner there. *R. Hob. 175.*

So, altho' he was a parishioner; for he ought not to have a fee, where nothing is done. *Semb. Sal. 332.*

But by the canon a *felo de se* shall not have burial in the church, or church-yard, without a license from the bishop or ordinary.

Nor, a man excommunicated.

(C) Tomb, Monument, &c.

SO, an heir or executor may erect, or set up a tomb-stone, or other monument in a convenient place within the church or church-yard, for the honour of his ancestor there buried.

And, if any one pull down or deface such tomb-stone or monument, the heir may have an action for it. *Co. L. 18. b.*

So, if any deface the arms, pennons, &c. put up in a window, or elsewhere, in honour of his ancestor. *Co. L. 18. b.*

Tho' they are defaced by the parson, ordinary, or churchwardens, as well as by a stranger. *R. 2 Cro. 367.*

So, the wife or executors, who set them up, may have an action for defacing them in their time. *Co. L. 18. b.*

But a monument, tomb, &c. cannot be erected to the hindrance of divine service. *3 Inst. 2c2.*

C E N S U R E S.

Ecclesiastical Censures.

Vide Prærogative, (D 12.)

C E R T A I N T Y.

Vide Abatement, (H 5.)—Action upon the Case upon Assumpsit, (A 3, &c. —H 3.)—Action upon the Case upon Trover, (G 2, &c.)—Appeal, (G 6.)—Arbitrament, (E 11.)—Copyhold, (S 19.)—Grant, (E 14. —G 5, 6.)—Indictment, (G 1, &c.)—Information, (D 2.)—Mandamus, (D 5.)—Obligation, (B 2.)—Pleader, (C 17, &c. 48.—E 5, &c.—F 17.—S 21. 41, 42.—2 W 7.—2 Z 1.—3 M 5.)—Prescription, (E 3.)—Rent, (B 7.)—Retorn, (E 1, 2.)

C E R T I F I C A T E.

(A) Trial by Certificate of the Bishop.

(A 1.) When it shall be.

IF there be issue upon general bastardy, it shall be tried by the certificate of the bishop. *Vide in Bastard, (D 2.)*

So, if the issue be, *ne unques accouple en loyal matrimony.* *2 Rol. 584. l. 52. Vide in Pleader, (2 Y 10.)* If

If the issue be, *whether there was a divorce.* 2 Rol. 585. l. 47.

Whether there was bigamy. 2 Rol. 587. l. 7.

Whether a man was professed in religion. 2 Rol. 584. l. 12. 586. l. 51.

So, *whether he was professed of such an order.* 2 Rol. 584. l. 10. 586. l. 53.

So, where the issue is, *whether a prior was dative or perpetual.* 2 Rol. 587. l. 10. 584. l. 20.

So, where the issue is, *whether a clerk were instituted or not*, it shall be tried by the ordinary. 2 Rol. 584. l. 3. Dy. 78. b.

So, *full or not full*; for the church is full by institution. 2 Rol. 583. l. 52.

So, an issue, *whether a clerk was able or not*, when the clerk is alive. 2 Rol. 583. l. 40.

Whether a clerk resigned, or was deprived. 2 Rol. 583. l. 45, 6.

Whether a church be void by deprivation. 2 Rol. 583. l. 45.

Whether a bishop be consecrated or not. 2 Rol. 588. l. 30.

Tho' the issue be upon the time of the consecration. 2 Rol. 588. l. 35.

So, if the issue be, *whether the dean or another is guardian of the spiritualties.* 2 Rol. 588. l. 26.

Whether a clerk was infra sacros ordines. Adm. 2 Lev. 250.

Or, *was so at the time of his institution*; for the time here refers to the institution, which shall be tried by the ordinary. Semb. 2 Lev. 250.

So, an issue, *whether excommunicated or not*, shall be tried by the ordinary. Co. L. 134. a.

Whether an executor refused to make probate of a will. Semb. 1 Leo. 205.

So, by the stat. 1 Jac. 4. *whether a recusant conformed.* Hard. 52.

(A 2.) When not.

But if a matter of spiritual cognizance is not directly in issue, it shall be tried by the country: as, where bastardy is not directly in issue. *Vide Bastard*, (D 2.)

If the issue be, *wife or not wife, espoused or not, &c.* 2 Rol. 585. l. 10. 17. Sho. 50. Sti. 10. 1 Leo. 53.

Whether feme-sole, or covert. 2 Rol. 585. l. 7. 12. 15. 20.

Whether A. be her husband, or not. 2 Rol. 585. l. 21.

If the issue be, *that she was married before her age of consent to B., and afterwards to the demandant, and so his wife, and not the wife of B.* 2 Rol. 585. l. 25.

So, *marriage or not*; for the marriage in fact, and not the legality of the marriage, is in question. R. 2 Rol. 585. l. 50. 2 Cro. 102.

So, in a personal action, if the issue be, *whether lawfully married*; for the marriage is the substance of the issue, and lawfully ought not to have been added. R. 1 Lev. 41.

So, if a matter of spiritual cognizance concerns persons dead, or strangers to the action; as, if the bastardy of B. be alleged, who is dead or a stranger. *Vide Bastard*, (D 2.)

So, if *ne unques accouple*, profession, &c. be alleged between strangers. 2 Rol. 584. l. 15. 585. l. 37. 40.

If

If a clerk be dead, when the issue is, *whether he was able, or not.*
2 Rol. 583. l. 42.

So, if a matter of spiritual cognizance is coupd and entangled with a matter of temporal cognizance, it shall be tried by the country; as, *special bastardy.* *Vide in Bastard, (D 2.)*

Marriage within age of consent, and afterwards a dissent, and so not his wife, shall be tried by the country. 2 Rol. 585. l. 25.

So, by the *stat. 12 Car. 2. 33.* bastardy or marriage according to an ordinance of parliament after 1 May 1642, before 1660.

So, if the issue be, *prior or not prior,* it shall be tried by the country. 2 Rol. 584. l. 21.

Avoidance of a church, &c. by being a bishop in Ireland. Pal. 459.

So, *parson or not,* upon special matter. 2 Rol. 585. l. 30.

So, *infra sacros ordines,* where it relates to avoidance of a church by the act of uniformity. D. 2 Lev. 250.

So, if there be issue upon institution and induction. 2 Rol. 584. l. 7. 585. l. 30.

Whether a church be void or not. 2 Rol. 584. l. 1. 588. l. 32.

Whether void by resignation. 2 Rol. 583. l. 47.

If issue be, *whether excommunicated after a prohibition,* it shall be tried by the country. 2 Rol. 585. l. 45.

Whether professed before a feoffment; for the question is upon the time. 2 Rol. 588. l. 20.

So, in the case of infancy, a matter of spiritual cognizance shall be tried by the country; as, bastardy alleged in him. 2 Rol. 586. l. 40. *Vide Bastard, (D 2.)*

A divorce for præcontract of his father and mother, in an assise by him. 2 Rol. 586. l. 37.

So, where it is pleaded only in abatement. *Vide in Bastard, (D 2.)*

As, if profession, or coverture be pleaded in abatement. 2 Rol. 588. S.

So, where a matter of spiritual cognizance comes in question in a collateral action. 2 Rol. 585. l. 40. 50. 586. l. 25. Hob. 179. *Vide supra,* where it is not directly in issue.

So, if the bishop return, *that the party is exempted out of his jurisdiction,* it shall be tried by the country; as, profession, where the bishop returns *that he is exempted.* 2 Rol. 587. l. 2.

So, if the power of the bishop to make a certificate be taken away by act of parliament. *Semb. Hard. 65.*

[The lawfulness of a marriage in Scotland may be tried by a jury. *Ilderton v. Ilderton, C. P. T. 33 Geo. 3. 2 H. Bl. 145.*]

(A 3.) By whom the Certificate shall be.

(A 3.) *If the bishop be a party.* So, if the bishop be a party to the suit, the trial shall not be by his certificate; as, in a real action against a bishop, if he plead, *that the demandant is a bastard,* it shall not be tried by himself, but by the metropolitan. 2 Rol. 587. l. 45.

So, in a *quare impedit,* where the bishop appears to be the disturber; if the issue be triable by the ordinary, a writ goes to the metropolitan. *Dyer, 353. b.*

As, if a bishop allege refusal, because the clerk was *in'abilis.* 2 Rol. 587. l. 25. *Dyer, 327. b.*

So,

So, if the issue be, *whether the bishop be consecrated*, it shall be tried by the metropolitan. 2 *Rol.* 590. l. 10.

So, if the archbishop of *York* be party, it shall be by the archbishop of *Canterbury*. 2 *Rol.* 589. l. 30. 40. *Dy.* 328. a.

But if the bishop is not the disturber, a writ to certify may be directed to him; as, in a *quare impedit*, where the bishop claims nothing, but as ordinary. 2 *Rol.* 587. l. 30.

Yet, if the bishop is a party, tho' he is not the disturber, the writ may be to him, or to the metropolitan at election. *R.* 2 *Rol.* 587. l. 40. 1 *Rol.* 364. 398.

So, if he be the disturber, the writ may be to him, at the election of the party. *Semb.* 1 *Rol.* 364. 397.

(A 4.) *If the see be vacant.*] If there should be a writ to the metropolitan, and the see become void, the certificate shall be by the guardian of the spiritualties. 2 *Rol.* 587. l. 50.

And the writ shall be, to the guardian of the spiritualties, *sede vacante*. 2 *Rol.* 589. l. 3. 5. *Dy.* 77. a.

And if any one by composition be guardian of the spiritualties, it shall be directed to him. 2 *Rol.* 588. l. 53.

So, in the vacancy of a bishopric, it shall be directed to the guardian of the spiritualties of the bishop. 2 *Rol.* 590. l. 25. *Dy.* 350. a.

Tho' the see of the bishop or archbishop become vacant after issue, or judgment, and before the writ awarded. 2 *Rol.* 590. l. 30.

So, by custom, the writ shall be to the archdeacon of *Chester*, as immediate ordinary, for all things within the county of *Chester*. 2 *Rol.* 588. l. 45.

And to the archdeacon of *Richmond*, for all things within 2 *Rol.* 588. l. 48.

So, excommunication may be certified by the delegates. 2 *Rol.* 590. l. 15. *R.* *Dy.* 371. b.

But, generally, the writ shall be directed to the bishop, tho' he be absent out of the realm. 2 *Rol.* 589. l. 10.

Tho' his vicar in his absence refuse the writ. 2 *Rol.* 589. l. 15.

Tho' the temporalities are seized into the king's hands. 2 *Rol.* 590. l. 20.

Tho' the bishop be only elected, and not consecrated. 2 *Rol.* 590. l. 5.

Yet, if the king by his writ certify the absence of the bishop, before the writ awarded, or before the return of it, the writ shall be directed to the bishop, or his vicar general. 2 *Rol.* 589. l. 20. 25.

If the writ be directed to the guardian of the spiritualties, and before execution a bishop is created, there shall be a new writ to him. 2 *Rol.* 590. l. 35. *Dy.* 350. a.

(A 5.) Upon what Foundation, and at what Time.

None can write to the bishop to make a certificate, except the king's courts. *Co.* L. 134. a. 2 *Rol.* 589. l. 50.

As, *B. R.* or *C. B.* *Co.* L. 134. a. 2 *Rol.* 589. l. 50.

The justices of gaol delivery. *Co.* L. 134. a. 2 *Rol.* 589. l. 50.

But the courts of *London*, *Norwich*, *York*, &c. cannot write to the ordinary. 2 *Rol.* 589. l. 50.

And therefore, if a plea be there of a matter triable by the certificate

ficate of the ordinary, after issue joined, there shall be a *mittimus* to remove it in *B. &c.*; and after a writ to the bishop, and a certificate upon it, there shall be a *procedendo*. 2 *Rol.* 589. *l.* 50.

A certificate by the bishop of bastardy, &c. is of no avail, except upon the king's writ to him directed.

And the writ shall always be to the bishop, not to his commissary, &c. *R.* 1 *Leo.* 205.

If there be a writ to the bishop to certify bastardy, &c. and afterwards the assise discontinues by the justices not coming, and a re-attachment is sued, the bishop may afterwards make a certificate without a new writ. 2 *Rol.* 590. *l.* 50.

(A 6.) How it shall be made.

The certificate of the ordinary must be positive and express. *Vide* *Bastard*, (D 2.)—*Pleader*, (2 Y 10.)

The certificate of the bishop shall be conclusive; for no averment lies against it. *R.* 1 *Leo.* 205.

But an action upon the case lies for a false certificate; as, for a false return. *Semb.* 1 *Leo.* 205.

Vide Excomengement, (B 2, &c.)

(B) Trial by Certificate of the Recorder of *London*.

IF issue be joined, *whether there be such a custom of London*, it shall be tried by the mayor and aldermen, by the mouth of the recorder. 2 *Rol.* 579. *l.* 10. 580. *l.* 5—25. 35. 40. 2 *Inst.* 126. Confirmed by charter 2 *Ed.* 4.

[And the recorder appears in the purple cloth robe, faced with black velvet; not his scarlet gown, his black silk one, nor the common bar gown. 1 *Bur.* 251.]

And the recorder may make his certificate *ore tenus*. *Cro. Car.* 361. 516.

[And afterwards deliver in the writ with a written copy of the return. 1 *Bur.* 249.]

Tho' the custom to be tried does not concern lands, or a devise of them, but a collateral thing. *R.* 2 *Rol.* 579. *l.* 35. *Cro. Car.* 517. *Jen.* 412.

Tho' it be in an action by *qui tam*, &c. which concerns the king. *R.* 2 *Rol.* 579. *l.* 30.

And upon such issue, there shall be a surmise by the plaintiff, that it ought to be certified by the recorder. 2 *Rol.* 581. *l.* 5. *Cro. Car.* 516.

[But if the recorder has once certified a custom as part of the customs of *London*, the court must take notice of it, and it cannot be certified again. *Doug.* 380.]

But if there be a custom for the profit of the city, it shall be tried by the country, and not by the mouth of the recorder; as, whether there be a custom, *that every freeman shall be quit of payment*, &c. *R.* 2 *Rol.* 579. *l.* 15. *Hob.* 86.

That such a thing shall be forfeited to the mayor, citizens, and commonalty, &c. *R.* 2 *Rol.* 582. *l.* 10.

So, if the custom is not directly in issue, it shall be tried by the country; as, if a custom be alleged *for a market in London every day*
in

in the week, &c. and the issue is, that there is no such market. R. 2 Rol. 580. l. 30. Hob. 87.

(C) Trial by Certificate of the Marshal, &c.

IF upon a *distringas* for escape, the issue be, *whether the tenant was in Scotland with the king for 40 days*, it shall be tried by the certificate of the marshal of the king's host under his seal. 2 Rol. 583. l. 30. Lit. sect. 102.

So, if issue be, *whether a man outlawed was in prison at Bourdeaux at the time of the outlawry*, it shall be tried by the certificate of the mayor of Bourdeaux. Co. Lit. 74. a.

[So, if a serjeant be arrested for a less debt than is allowed by the annual mutiny act, the certificate of the secretary at war may, on motion to discharge him, be read in evidence to shew the nature of his duty. 1 Black. Rep. 29.]

Certificate of Assise.

Vide Assise, (B 27, 28.)

Bankrupt's Certificate.

Vide Bankrupt, (D 37.)

Vide Enquest, (A 2, 3.)—Statute Staple, (D 2.)

C E R T I O R A R I.

(A 1.) When it lies.

THE writ of *certiorari* is an original writ issuing out of the Chancery of B. R. when the king would be certified of any record in any other court of record. F. N. B. 245. A.

Or, the king may command the tenor of the record, at his election. F. N. B. 245. B.

So, if *nul tiel record* be pleaded in C. B. the court may award a *certiorari*. 1 Rol. 394. l. 15. Hob. 135. R. Cro. Car. 297.

[So, if *nul tiel record* in C. B. of a recovery there be pleaded in B. R., and issue joined thereon, a *certiorari* is the proper method, and must necessarily issue. 2 Burr. 1034.]

[If a *certiorari* issues to use the record as evidence, then the tenor, if returned, is sufficient, and countervails the plea of *nul tiel record*; but if the record is to be proceeded upon, the record itself must be removed, and this, whether it is before judgment, or after; and in this case, the writ must be superseded, and not quashed, which can only be done on a view of the record itself. Woodcroft v. Kinaston, T. 1742, 2 Atkyns, 317.]

And therefore, the king may command the justices of C. B. to certify him of any record before them in his Chancery. F. N. B. 244.

Or, to send all records depending in C. B. before the justices in case to be determined by them. F. N. B. 243. K. And

And if the justices in *eyre* cannot determine during their stay in the same county, they shall be removed by *certiorari* into *C. B.* again. *F. N. B.* 243. *K.*

So, a *certiorari* lies to the chief justice of *B. R.* to certify a condemnation there for the king's fine, or other record, to the intent to have a pardon, &c. *F. N. B.* 245. *G.* 246. *C.*

So, there may be a *certiorari* to justices of assise, to certify a record before them into *Chancery*. *F. N. B.* 244. *C.*

Or, to remove all proceedings before them, before the new justices of assise. *F. N. B.* 242. *D.* 243. *C. D.*

Or, before other justices, to the intent to have an attain. *F. N. B.* 242. *E.*

[*Certiorari* to the justices of assise, shall be granted to the crown or prosecutor, without special reason alleged; *secus* to the defendant. *Garland v. Barton*, *M.* 11 *G.* 2. *Andr.* 27.]

[It lies to remove an information before justices of assise, against a parson for non-residence, for they have no jurisdiction in the cause. *Ibid.*]

So, to justices in *eyre* to remove a record, or proceedings before them. *F. N. B.* 242. *E.* 243. *K.* 1 *Sid.* 296.

So, if a record be removed into the *Exchequer*, there may be a *certiorari* to the treasurer and chamberlains of the *Exchequer*. *F. N. B.* 242. *F. G.* 243. *A.* 246. *O.*

So, a *certiorari* lies to the treasurer and barons to certify the debt of *B.* or his ancestor to the king, without saying, into *B. R.*, or into *Chancery*. *F. N. B.* 246. *G.*

So, a *certiorari* lies to the justices of gaol-delivery. *F. N. B.* 246. *A. H.*

So, a *certiorari* lies to the justices of *oyer* and *terminer* to certify a record into *B. R.*, in order to have execution upon it. *F. N. B.* 246. *B.*

So, after conviction, in order to have judgment. 1 *Sal.* 149. *Mod. Ca.* 17.

To the mayor and sheriffs of *London*, to remove a record before them to be determined in *B. R.* *F. N. B.* 245. *E.* 246. *I.*

To the steward and marshal of the king's house. *F. N. B.* 246. *F. K.*

To justices of peace, to remove an indictment before them. *Mod. Ca.* 17.

[To remove an indictment, for not doing statute-labour in the highway. *Rex v. Eachard*, 12 *G.* *Rex v. Greenhaw*, *M.* 3 *G.* 2. *Str.* 849.]

[To remove an indictment at sessions against private persons for not repairing a bridge. *Rex v. Hamworth*, *P.* 4 *G.* 2. *Str.* 900. *Rex v. Cumberland*, *H.* 35 *G.* 3. 6 *T. R.* 194.]

[To the quarter sessions of a corporation to remove an indictment, on affidavit that defendant could not have a fair trial. *Rex v. Farwle*, *M.* 13 *G.* *Ld. Raym.* 1452.]

Or, to justices of peace to remove an outlawry, and process transmitted to them. *F. N. B.* 246. *I.*

So, it lies to justices of peace, to remove any order made by them. *R.* 3 *Mod.* 95.

[To the sessions, to remove an order of two justices. *Rex v. Warminster*, M. 8 G. Str. 470.]

To remove order of justices before appeal, where only one party has a right to appeal, for he may waive it; or where no time is limited for appealing, for then a *certiorari* might never lie; but where two parties have a right to appeal, and the time of appealing is fixed, there it shall not be granted till after appeal, or after the time for it. *Rex v. Harman*, H. 12 G. Andr. 343.]

[One *certiorari* lies to remove several orders and convictions, if they relate to the same persons and the same matter. *Ibid.*]

[It lies from B. R. to all inferior courts, tho' the statute giving jurisdiction say that the sentence shall be final, and without appeal, for the jurisdiction of B. R. cannot be taken away without *express* words. 2 Bur. 1042. 1 Black. Rep. 233.]

[Therefore it lies to remove orders made on the conventicle act 22 Car. 2. c. 1. even after appeal to the quarter sessions, trial by jury, verdict and judgment, notwithstanding the 6th and 13th sections, the first of which says, that no other court whatsoever shall intermeddle with any cause or causes of appeal on this act, but that they shall be finally determined in the quarter-sessions only; and the latter enacts that the act shall be interpreted most beneficially for suppressing conventicles; for the *certiorari* does not go to try the merits, but to see whether the limited jurisdiction has exceeded its bounds or not. *Id. ibid.*]

[If a statute creating an offence give cognizance of it to one justice, with an appeal to the sessions, and take away the *certiorari*, as to all the proceedings, and afterwards further powers, for the punishment of the offender, are given to the sessions by another statute, which does not take away the *certiorari*; the clause for taking away the *certiorari* in the former act cannot be extended to the proceedings under the latter; therefore, where there have been proceedings under both statutes, those under the former act cannot be removed, but those under the latter may. 2 Term Rep. 735.]

[So, to remove order out of quarter sessions, on appeal from a scavenger's rate, altho' 2 W. & M. 2. c. 8. says their order shall be final without any appeal to any court. *Rex v. St. Andrew's Holborn*, H. 4 G. 3. 3 B. M. 1458.]

Or, to a particular justice of peace, for a conviction or order by him.

So, to commissioners of sewers, for all orders or proceedings before them. *F. N. B.* 247. *A.* 1 Sal. 145. *Vide Sewers*, (11.)

[To commissioners of sewers, for their order to remove their clerk, it is of common right; but in other cases, where danger of inundation may be, it is discretionary. *Commissioners of Sewers in Yorkshire*, M. 11 G. Str. 609.]

On the clerk of commissioners of sewers being removed, and another appointed, B. R. will not, on the rule to shew cause, suffer them to make out their titles by affidavits, but will grant *certiorari*. *Rex v. Banks*, M. 11 G. Fort. 374.

To a bishop to certify admission, institution, and induction to a church. *F. N. B.* 246. *M.*

To an escheator. *F. N. B.* 247. *H.*

To the *custos brevium* of C. B. to certify a writ original, or judicial. *F. N. B.* 246. *N.* To

To the mayor of the staple, to certify a statute before him. *F. N. B.* 244. *D.* *Vide Statute Staple*, (D 2.)

To a sheriff, for the record of a *re-disseisin* or *post-disseisin* before him. *F. N. B.* 242. *B.*

And that, to the intent to have execution out of *B. R.* *F. N. B.* 242. *B.*

[It lies to remove inquisition taken by the sheriff under a private act of parliament, and the verdict and judgment thereon. *Rex v. Mayor of Liverpool*, *T.* 8 *G.* 3. 4 *B. M.* 2244.]

To sheriffs and coroners to certify an outlawry in the county. *F. N. B.* 245. *G.*

So, it lies to the mayor, bailiffs, or other judge of a court in a city or town, to remove a record into *B. R.* to have execution there. *F. N. B.* 243. *B.*

So, to the censors of the college of physicians, to remove a judgment by them for malpractice. *R.* 1 *Sal.* 144.

[So, it lies to remove a presentment in a court leet. *Cowp.* 458.]

[But *B. R.* will not grant a *certiorari*, to remove the record and proceedings out of a court leet, in order to inquire into the propriety of an amercement, where the fine has been estreated into the duchy chamber of *Lancaster* and paid. 2 *Term Rep.* 184.]

So, to every inferior jurisdiction of record. 1 *Sal.* 144.

Tho' it be within a county palatine, or in *Wales*, &c. *R.* 1 *Sal.* 146. 148. *R.* 2 *Rol.* 29. *Vide Franchises*, (D 1, &c.)

[To remove indictment from quarter sessions in *Wales*, without stopping at the grand sessions. *Rex v. Lewis*, *T.* 9 *G.* 3. 4 *B. M.* 2456.]

[To the grand sessions in *Wales*, on an indictment for misdemeanour. *Rex v. Lewis*, *T.* 12 *G.* *Str.* 704. *B. R. H.* 163.]

Or, the cinque-ports. 2 *Lev.* 86. *Vide Franchises*, (E 1, &c.)

[Or, to *Berwick*, or to any other dominions of the king or crown. 2 *Bur.* 856.]

Vide Pleader, (3 *K* 7.)

[The king's attorney-general has a right to demand it, when the right of the crown is concerned; even to move it on the part of the defendant. *R. v. Tindal*, *P.* 27 *G.* 2. *R. v. Burgess*, *P.* 27 *G.* 2.]

[But where there is a private prosecutor, it is discretionary, yet 'tis of course for prosecutor; but defendant must shew special ground to obtain *procedendo*. *Ibid.* *Rex v. Lewis*, *T.* 9 *G.* 3. 4 *B. M.* 2456. 2 *Term Rep.* 89.]

[It is discretionary in the court to grant or refuse a *certiorari* to remove a conviction before justices of the peace; and if the court see that the justices have drawn the proper conclusion from presumptive evidence, they will refuse it. *Rex v. Bafs*, *E.* 33 *Geo.* 3. 5 *T. R.* 251.]

[It lies on the part of the prosecution to remove an indictment on *ss.* 13 *G.* 3. c. 78. s. 24. for a nuisance in an highway, before traverse or judgment thereon. *Cowp.* 78.]

[An indictment found at the quarter sessions upon the toleration act 1 *W. & M.* c. 18. for disturbing a dissenting congregation, may be removed into *B. R.* by *certiorari* before verdict. *Rex v. Hube*, *B. R. H.* 34 *G.* 3. 5 *T. R.* 642.]

(A 2.) When a *Mittimus* thereupon.

After a record removed by *certiorari* to the *Chancery* out of *C. B.*, or other court, it may by *mittimus* be transmitted to *B. R.* *F. N. B.* 244. *A. B.*

Or, when removed by *certiorari* from the justices of assise, or other justices to the *Chancery*, it may be transmitted to *C. B.* *F. N. B.* 244. *C.*

So, a record, removed by *certiorari* to another court, or justices, may afterwards be transmitted to *B. R.*, or other justices at the king's election. *F. N. B.* 245. *F.*

Or, it may be removed by *certiorari* to *B. R.* immediately without a *mittimus*. *R. 1 Lev.* 312.

But if there be a material variance between the *certiorari* and the order, &c. the record shall not be removed thereby: as, if there be a *certiorari* for an order concerning *foreign salt*, and the order is for *salt*, generally. *R. 1 Sal.* 145.

If it be for an indictment only, and the indictment and conviction also are returned. *1 Sal.* 150.

If the indictment be after the *certiorari* granted. *1 Sid.* 317.

If a record be removed by *certiorari* after conviction in another court, the party must waive the issue, and it shall be tried *de novo*; otherwise *B. R.* will not give judgment upon a conviction in another court. *R. Carth.* 6.

[The recognizance of a receiver of an infant's estate in *Ireland* cannot be transmitted to the *Exchequer* in *Ireland* by *mittimus*, but a bill must be filed there, and the certificate of the recognizance here will be evidence. *Lord Castlemoer v. Lady Castlemoer*, *H.* 1727, *Bunb.* 249.]

(B) How a *Certiorari* shall be prosecuted.

[THE affidavits for a *certiorari* shall be intitled by the name of the cause in the court below. *Rex v. Lewis*, *T.* 12 *G. Str.* 704.]

By the *st.* 1 & 2 *Ph. & M.* 13. a *certiorari* to remove a prisoner out of gaol, or a recognizance shall be signed by the chief justice, or in his absence by the other justices of the court whence it issues, on pain of 5*l.* against the prosecutor.

By the *st.* 5 & 6 *W. & M.* 11. no *certiorari* shall be granted to remove an indictment for a trespass, or a misdemeanor from the quarter sessions in term, but on a rule in *B. R.* on motion of counsel in open court, nor in vacation, but on allowance of a judge, who shall indorse his name, and the name of him who demands it.

In vacation there must be a *fiat* signed by a judge for a *certiorari* for orders of justices. *1 Sal.* 150.

And the *fiat* and the writ also must be signed by a judge in a *certiorari* for an indictment. *1 Sal.* 150.

And a *fiat* after the *essoign* day of the term, for a *certiorari*, which was tested in the preceding term, will be irregular. *R. 1 Sal.* 150.

So, by the *st.* 21 *Jac.* 8. a *certiorari* to remove an indictment of riot, forcible entry, or assault and battery from the quarter sessions, shall be delivered in open court, and not allowed unless the indicted be bound in sureties in 10*l.* to the prosecutor, to pay costs, which the

the justices in the quarter sessions shall assess, within a month after conviction.

So, by the *st.* 13 & 14 *Car.* 2. 6. it shall not be allowed to remove proceedings about highways, unless bound, &c. in 40*l.* to pay costs to be ascertained upon oath.

[*Certiorari pro rege* lies in case of highways, tho' no affidavit nor recognizance; for the *st.* 13 & 14 *C.* 2. c. 6. 3 *W. & M.*, and 5 *W. & M.* c. 11. relate only to *certiorari's* applied for by defendants. *Rex v. Farewell*, P. 17 G. 2. *Str.* 1209.]

Nor, by the *st.* 5 & 6 *W. & M.* 11. to remove an indictment for a trespass or misdemeanor before trial, unless bound, &c. in a recognizance of 20*l.* before justices of peace (or by the *st.* 8 & 9 *W.* 3. 33. before a judge of *B. R.* to appear, plead, and try it the next assizes, or if in *London* or *Middlesex*, the next term, or sitting after term.

[Under the 3d section of the first of these acts the representatives of the prosecutor are entitled to the costs taxed during his life, tho' no personal demand was ever made by him. 1 *Term Rep.* 103.]

[But no costs are due on a *certiorari* removing summary proceedings, unless a recognizance be entered into at the time of removing the proceedings. However, it is discretionary in the court to grant a *certiorari* or not, and for the future they will compel the party to enter into a recognizance. 1 *Term Rep.* 82.]

And if he be convicted, *B. R.* shall give costs, and upon oath of refusal for ten days after demand, send an attachment.

[The *stat.* 5 & 6 *W. & M.* c. 11. as to defendant's paying costs to prosecutor, extends only to officers and persons really injured; therefore defendant indicted for an attempt to commit felony, where no damage is done to the prosecutor, shall not pay costs. 1 *Wils.* 139. 1 *Burr.* 431. 2 *Term Rep.* 47.]

[But it is sufficient if prosecutor is proved to be a civil officer (as by affidavit) tho' it is not indorsed on the indictment. *Rex v. Smith*, *Mich.* 30 G. 2. 1 *B. M.* 54.]

[If, on removing indictment from sessions of *oyer* and *terminer*, defendant enters into recognizance of 500*l.* to plead, go to trial, and appear on the return of the verdict, this is not a recognizance on *stat.* 5 & 6 *W. & M.* c. 11. but at common law, and defendant shall not pay costs. *Rex v. Sidney*, P. 15 G. 2. *Str.* 1165. *Rex v. Fonseca*, *M.* 30 G. 2. 1 *B. M.* 10.]

And if bail be not found before a judge since the *st.* 8 & 9 *W.* 3. 33. a *certiorari* ought not to be allowed. 1 *Sal.* 149.

So, by the *st.* 3 & 4 *W. & M.* 10. s. 6. there shall be no *certiorari* to remove a conviction or proceeding on that act against destroying deer, unless bound by recognizance with sureties, as the justices of peace before whom he is convicted shall approve, in 50*l.* conditioned to pay the prosecutor his full costs, to be ascertained by oath.

So, by rule in *B. R. Mich.* 3 *W. & M.* on a *certiorari* to remove any indictment, or presentment from any county or corporation, except *London* or *Middlesex*, the defendant at the return shall procure men to give a recognizance before a judge of the court to plead, and if issue be joined, to try it on notice to the prosecutor or his clerk

at his next assises, and in default thereof, before the end of the term a *procedendo* shall go. *Sho.* 336.

So, by the *stat.* 5 G. 15. no *certiorari* shall be to remove a conviction for deer-stealing, till security to pay the forfeiture as well as costs, and render the party to justice in a month after the conviction confirmed.

But a recognizance is not forfeited for not trying, unless the prosecutor gives a rule for it. 1 *Sal.* 370.

If the sureties are worth as much as the statute requires, the justices of peace cannot refuse them as insufficient. *R.* *Mar.* 27.

If a recognizance be given upon a *certiorari* for costs; the prosecutor shall have only costs upon the writ, and after it. *R.* 1 *Sal.* 55.

[The *stat.* 5 G. 2. c. 19. s. 2. requiring the party removing a conviction by a magistrate into B. R. to enter into a recognizance with two sureties in 50 l., conditioned to prosecute the writ with effect, &c. is not complied with by the party and his two sureties entering into a recognizance in 25 l. each, but it must be in the entire sum of 50 l. *Rex v. Dunn*, E. 39 G. 3. 8 T. R. 217.]

[So, by 13 G. 2. c. 18. s. 6. no *certiorari* shall be granted to remove any conviction, judgment, order, or other proceeding before any justice of peace of any county, city, borough, town corporate, or liberty, or the respective general or quarter sessions thereof, unless application be made for it within six calendar months after such conviction, &c. and unless it be proved on oath that the party applying for the same hath given six days notice in writing to the justice or justices, or to two of them, (if so many there be,) before whom such conviction, &c. was had, that such justice, &c. may shew cause against the issuing of the *certiorari*. *Vide* 1 *Wilf.* 35.]

[The six days notice required by *stat.* 13 G. 2. c. 13. s. 5. before any application for a *certiorari* to remove proceedings by justices of the peace must be given before making the motion for a rule to shew cause why such *certiorari* should not be granted. *Rex v. Justices of Glamorganshire*, T. 33 G. 3. 5 T. R. 279.]

[On *certiorari* to remove indictment for perjury, if defendant makes up the record, carries it down to sittings with a *disfringas*, and attorney-general's warrant for a *tales*, there being special jury, and eleven only appear, and the warrant is given prosecutor's counsel, and they will not pray a *tales*, and defendant does not, and cause is made a *remanet pro defectu jurator.*, defendant shall not pay costs. *Rex v. Lowfield*, T. 5 & 6 G. 2. *Str.* 937.

If prosecutor has obtained a third part of the fine, it shall be deducted out of the costs taxed on the recognizance. *R. v. Osborne*, T. 7 G. 3. 4 B. M. 2125.]

And the prosecutor, after the costs paid, ought not to move for an aggravation of the fine. *R.* 1 *Sal.* 55.

[On indictment on 5 *Eliz.* c. 4. for exercising a trade, &c. removed by defendant after conviction, he may, on motion, pay the penalty without costs, and have his recognizance discharged. *Rex v. Strong*, M. 31 G. 2. 1 B. M. 431.]

[If A. convicts B. on the game laws before a justice, and he pays the penalty, and then A. brings action for the same offence, the justice refuses copy of conviction, and B. brings *certiorari* merely to have

have the conviction to plead; *A.* gets it affirmed, and then becomes nonsuited in the action: the court will not give costs on the *certiorari*, but order the bond to be delivered up. *Rex v. Midlam*, T. 5 G. 3. 3 B. M. 1720.]

If a recognizance be taken for 40 *l.* not for 20 *l.* as a statute speaks, it will be a good recognizance, tho' no *superfedeas*. *R. Sal.* 564.

If he who sues a *certiorari*, does not appear in court within the term when the writ is returned, he shall forfeit his recognizance. *Mod. Ca.* 220.

If, upon a *certiorari* the party gives a recognizance, and does not prosecute with effect, viz. does not quash or traverse the indictment, an attachment lies against him. *R. Mar. Pl.* 118.

[If defendant, convicted on penal statute, brings *certiorari*, and dies before argument, the court will go on. *Rex v. Roberts*, T. 5 & 6 G. 2. *Str.* 937.]

[If no proceedings in two or three terms, order shall be affirmed. *Rex v. Oulton*, H. 9 G. 2. B. R. H. 206.]

[If defendant has paid costs for not going on to trial, prosecutor shall not quash, but on payment of costs. *Rex v. Moore*, H. 6 G. 2. *Str.* 946.]

[If the prosecutor enlarges the rule to shew cause why an order should not be quashed, he shall not afterwards object to the issuing the *certiorari*. *Rex v. Hartshorn*, H. 32 G. 2. 2 B. M. 745.]

[Proceedings being removed from inferior court of record, where parties were at issue, plaintiff must declare *de novo*. *Barnes*, 345.]

[When a conviction is removed by *certiorari*, no motion can be made in arrest of judgment, unless the defendant appear in person. 1 *Black. Rep.* 209.]

[And if defendant remove an indictment by *certiorari* without good cause, he cannot be admitted *in forma pauperis*. 1 *Black. Rep.* 230.]

(C) How it shall be returned.

A *Certiorari* shall be returned by the justices, to whom it is directed, with the record, &c. annexed, not by the clerk of the peace. *R. Sal.* 479.

By a rule in B. R. *Mich.* 3 W. & M. it shall be returned the first return of the next term. *Sho.* 336.

Justices of peace must return, tho' bail be not found according to the *stat.* D. 1 *Sid.* 70.

Justices of peace ought to return all indictments against him who procures it, found before the return, tho' not indicted at the time of the awarding of the writ, or delivery to the officer. *R. 1 Rol.* 395. l. 30.

If it be for indictments against six named in the writ, if four of them only are indicted, the indictments shall be removed. *R. 1 Rol.* 395. l. 35.

The names of the indictors ought to be returned upon every indictment removed. *St. P. C.* 71. a.

If there be a *certiorari* for a conviction, &c. it must be drawn in form; for a return of affidavits and warrants is not sufficient. 1 *Sal.* 146.

So, if the return be *tenor cujus ordinis sequitur*; for it ought to say, *qui quidem ordo*, &c. 1 Sal. 147.

So, if there be a return of a transcript, the record itself is removed. Sal. 565.

But if a *certiorari* be for indictments, in which *A.*, *B.*, and *C.* are indicted; an indictment against *A.* alone, or against *A.* and *B.* shall not be returned. 1 Sal. 146. 151.

If, for an order of settlement at *N. M.*, an order which settles at *N.* only shall not be returned. R. Sal. 452.

So, in some cases, the return may be in *English*; as, in orders by justices, &c. 1 Sal. 149.

If the justices do not make a return, an *alias* and *pluries* go, and if they do not return the *pluries*, *vel causam*, an attachment goes. F. N. B. 245. A.

But justices of peace need not subscribe their names; for *responsio justiciariorum domina regina*, is sufficient. Mod. Ca. 43.

So, a *certiorari* to remove an order of discharge of an apprentice, need not return the discharge itself under the hands and seals of the four justices; for it is sufficient to say, that there was an order under their hands and seals. R. Sal. 470.

[A *certiorari*, being directed to the *custos brevium* of *C. B.* to return original, he shall return the original, and not that there is such original in his office, but not filed, because plaintiff had entred *ne recipiatur*; if otherwise, *B. R.* will commit him. *Cork v. Baker*, M. 4 G. Str. 63.]

If a *certiorari* is directed to the *custos brevium* of *C. B.* to certify an original in *London*, and he returns there is none in the city of *London*, it is good; for the court will take notice that *London* is a city, it being mentioned to be so in several acts of parliament. *Withers v. Warner*, P. 6 G. Str. 309.

If, in a return it is said, that a man took a lease for seven years, the court will presume it was by deed. *Rex v. Little Dean*, T. 9 G. Str. 555.

[The return must be on parchment; if on paper, it shall be quashed. *Rex v. Stow Bardon*, M. 9 G. 2. B. R. H. 173.]

[Upon a *certiorari* to remove a conviction by a justice of the peace on the deer act (16 G. 3. c. 30.), a return that the record is returned to the sessions, and that a copy is annexed to the writ, is sufficient. *Rex v. Eaton*, H. 28 G. 3. 2 T. R. 285.]

(D) When a *Certiorari* does not lie.

BUT a *certiorari* lies only for the tenor of a record, when the court to which the record by the *certiorari* is removed, has no jurisdiction to hold plea upon the record: as, if to an information for recusancy in *C. B.* it be pleaded, that he is a recusant convict before justices of peace, and upon *nul tiel record* a *certiorari* goes to the justices of peace, the tenor only of the conviction shall be returned; for *C. B.* cannot hold plea upon the conviction, if it should be removed. R. 1 Rol. 394. l. 50. Hob. 135.

So, if a judgment in an inferior court be pleaded; upon *nul tiel record* pleaded, if a *certiorari* goes, only the tenor of the record shall be certified. Dy. 187. a.

So,

So, by charter, the city of *London* certifies only the tenor of the record. 1 *Sid.* 155. 230.

By the *stat.* 22 *Car.* 2. 12. it does not lie to remove indictments for repair of causeys, highways, or bridges before judgment. But now, by the *stat.* 5 & 6 *W. & M.* 11. it shall be allowed upon an *affidavit* that the right of repair is in question.

So, by the *stat.* 7 & 8 *W.* 3. 6. no *certiorari* shall remove or supersede the proceedings or judgment on that act, unless the title of the tithes, &c. come in question.

[So, no *certiorari* lies on the statute 30 *G.* 2. c. 24. against obtaining money, &c. by false pretences, for by *stat.* 20. it is expressly taken away. *Vide Cowp.* 24. 2 *Term Rep.* 472.]

[Where the *certiorari* is taken away by act of parliament, the crown is not included in the restriction, unless there be some words in the act, to shew that such was the intention of the legislature. There are no such words in *stat.* 30 *G.* 2. c. 24. or in the *stat.* 25 *Geo.* 2. c. 36. *stat.* 10. against keeping disorderly houses. *Rex v. Davies, B.* 34 *G.* 3. 5 *T. R.* 626.

So, it shall not be granted to remove a commitment for felony, till an indictment found. 1 *Vent.* 63.

[It does not lie to remove an indictment for *felony* from the general sessions of *oyer and terminer* at *Hicks's Hall*, without consent of the prosecutor. *Cowp.* 283.]

[It does not lie to remove a conviction by the commissioners of excise for the double duties on beer under the 12 *Car.* 2. c. 24. *stat.* 33. for by the general words of 6 *G.* 1. c. 21. *stat.* 22. it is taken away in all cases of *forfeiture* under the excise laws previous to that act. *Doug.* 549.]

[But that act does not extend to take away the *certiorari* in cases arising under subsequent acts, as in the case of a conviction by justices on the statute of 11 *G.* 1. c. 30. *stat.* 16. *Id.* 553. n.]

So, a *certiorari* shall not be granted to remove an indictment from the *Old Bailey*, or any justices of gaol-delivery, without special cause. 1 *Sal.* 144. 150, 151. [*Rex v. Gunston, P.* 10 *G.* *Str.* 583. *Rex v. Ferguson, P.* 10 *G.* 2. *B. R. H.* 369.]

[*Certiorari* granted to the *Old Bailey*, to remove indictment for forgery, defendant being of good repute, and prosecution on slight grounds. *Rex v. Wills, P.* 9 *G.* *Str.* 549.]

Certiorari refused to a colonel indicted for perjury. And the court declared they must make no distinction of persons, and that they cannot grant a *certiorari* without consent of the prosecutor. *Rex v. Pusey, M.* 13 *G.* *Str.* 717.

The court will grant *certiorari* to remove indictment of perjury from the *Old Bailey*, if defendant has twice paid costs for not going on to trial, the judges being gone. *Rex v. Morgan, T.* 9 *G.* 2. *Str.* 1049.

Or, if prosecutor's attorney is under-sheriff of *Middlesex*, and attended the grand jury on finding the bill. *Rex v. Webb, H.* 10 *G.* 2. *Str.* 1068.]

And if the cause afterwards appears to be false, a *procedendo* shall go. 1 *Sal.* 144.

So, it shall not be granted to remove a conviction of recusancy, in not taking the oaths, &c. for thereby the conviction would be made ineffectual. *R.* 1 *Sal.* 145. [It

[It does not lie, to remove a poor's rate itself. *Rex v. Uttoxeter*, P. 5 G. 2. Str. 933. *Rex v. Shrewsbury*, P. 7 G. 2. Str. 975; 2 Term Rep. 235.]

[Nor, on an order on 7 & 8 W. 3. c. 29. for the parish at large to repair the highways, in aid of the inship. *Rex v. Eckerball*, M. 6 G. 2. Str. 944.]

[Nor to remove the assessments of the land tax, on account of the public inconvenience. But if an information be moved for against the commissioners of the land tax, the court will admit an attested copy of the assessment as evidence, instead of the original. 2 Term Rep. 235.]

Nor, for an order of justices, upon which an appeal lies, before an appeal, or the time for an appeal elapsed. 1 Sal. 147.

Yet, if no objection is made till the return filed, it will be too late. 1 Sal. 147.

[Nor, on an appointment of overseers, after an appeal lodged till the sessions have made a determination. *Warwick's Case*, Mich. 8 G. 2. Str. 991.]

But on appointment of overseers before appeal, it lies. *Ibid.*

And if on appeal from a poor's rate, sessions order books to be produced at an adjourned day, *certiorari* lies to remove that order, notwithstanding the appeal. *Ibid.*

[To the quarter sessions, to fetch up any proceedings but their orders; as their refusal of a certificate of the loss of malt burnt after duty paid. *Case of Mayo and Parsons*, M. 7 G. Str. 391.]

So, it shall not be granted regularly, after a conviction upon an indictment before judgment. 1 Sal. 149. *Mod. Ca.* 17. 61.

[Nor after appeal to the sessions, pending such appeal. 2 Term Rep. 196.]

[A verdict cannot be removed from sessions, before judgment; and *certiorari*, if granted, shall be quashed. *Rex v. Nicolls*, P. 18 G. 2. Str. 1227.]

And if granted before conviction, and not served till after, or jury sworn, it shall be quashed. *Mod. Ca.* 61.

[The court quashed a *certiorari*, which was issued before, but not served until after judgment on an indictment for a misdemeanor. *Rex v. Seton*, T. 37 G. 3. 7 T. R. 373.]

[After judgment the record can be removed only by writ of error. *Ibid.*]

[Before *certiorari* issues to remove order for quaker's tithes, it ought to be determined, whether the title is really in question or not. *Rex v. Wakefield*, 31 G. 2. 1 B. M. 485.]

If *certiorari* has issued, and the return filed, yet, if it appears that the title is not really in question, the court will order it to be superseded, *quia improvide*, and the return taken off the file. *Ibid.*

[So, if it issues, where it is taken away by act of parliament, (tho' order of sessions refers it to the court by consent of parties,) *superfedeas quia improvide*. *R. v. Micklthwayte*, H. 10 G. 3. 4 B. M. 2522.]

So, it is not usually granted, to remove an indictment for forgery, perjury, or other great offence. 1 Sid. 54.

[If an attorney is indicted at the assizes for a forgery, in altering a fault in a writ under seal, the court will not grant *certiorari*. *Rex v. El*

v. Elford, M. 4 G. 2. Str. 877. *Rex v. Bastland*, H. 17 G. 2, Str. 1202.]

Or, a presentment before justices in *eyre*, before conviction. 1 Sid. 296.

[Nor, to a new jurisdiction erected by statute, which has a final authority; if it proceeds according to the statute. 1 Sid. 296.]

Nor, usually to a county palatine. 2 Bul. 158.

[It cannot be sued out as of course, and without laying a special ground before the court, to remove proceedings in an *action* in the courts of the counties palatine. Doug. 749.]

[Nor, to remove such proceedings in the courts of great sessions of Wales. Id. 751, n.]

So, it shall not be granted, to remove a record in which the king is concerned, without the consent of the attorney-general. R. Hard. 409. Sti. 295.

[It lies not to remove ejectment from *mayor's court*, but *hab. corp.* and plaintiff declares *de novo*. In *replevin* it lies, and parties do not begin *de novo*. Barnes, 421.]

And it seems to be in the discretion of the court, to grant it or not. Sti. 126. 211.

[And where an *appeal* lies, the court will not grant a *certiorari*, if the objection be not to the jurisdiction but to the merits, altho' it be otherwise competent for them to grant it. Doug. 553.]

(E) When it shall be a Superfedeas.

IF a *certiorari* be delivered to a justice of peace, or other justice to whom it is directed, it shall be a *superfedeas*, and every proceeding afterwards is a contempt. R. Yel. 32. 1 Sal. 148.

And every proceeding afterwards is void. Per Keble, Attorney-General cont. 6 H. 7. 16. R. Mar. 27.

And error lies for it. R. 1 Sal. 148.

If it be delivered to one justice only, it shall be a *superfedeas* to all. Yelv. 32.

Tho' the party does not sue for a removal of the record. Yelv. 32.

Tho' the indictment be after the *teste* of the *certiorari*. Yel. 32. R. 1 Sal. 149.

So, if several are indicted, and one of them only brings a *certiorari*, it shall be a *superfedeas* to all of them. Dub. Mar. 112.

So, if one only tenders a surety according to the statute, and the others refuse. R. Mar. 27.

So, a *certiorari* shall be a *superfedeas* to the justices, tho' delivered after the return passed. Yel. 32. R. Dy. 245.

When a *certiorari* is granted, the party may have a *superfedeas* out of Chancery to the sheriff. F. N. B. 237. E.

So, the justices of peace ought to award a *superfedeas* to the sheriff *ex officio*. Qu. F. N. B. 237. E.

(F) When not.

BUT a *certiorari* will not be a *superfedeas*, if no sureties are found, when required by statute. Mod. Ca. 33. 43.

Or, if the party does not try the indictment afterwards, according to the condition of the recognizance given. Mod. Ca. 43. So,

[It does not lie, to remove a poor's rate itself. *Rex v. Uttoxeter*, P. 5 G. 2. Str. 933. *Rex v. Shrewsbury*, P. 7 G. 2. Str. 975; 2 Term Rep. 235.]

[Nor, on an order on 7 & 8 W. 3. c. 29. for the parish at large to repair the highways, in aid of the inship. *Rex v. Eckershall*, M. 6 G. 2. Str. 944.]

[Nor to remove the assessments of the land tax, on account of the public inconvenience. But if an information be moved for against the commissioners of the land tax, the court will admit an attested copy of the assessment as evidence, instead of the original. 2 Term Rep. 235.]

Nor, for an order of justices, upon which an appeal lies, before an appeal, or the time for an appeal elapsed. 1 Sal. 147.

Yet, if no objection is made till the return filed, it will be too late. 1 Sal. 147.

[Nor, on an appointment of overseers, after an appeal lodged till the sessions have made a determination. *Warwick's Case*, Mich. 8 G. 2. Str. 991.]

But on appointment of overseers before appeal, it lies. *Ibid.*

And if on appeal from a poor's rate, sessions order books to be produced at an adjourned day, *certiorari* lies to remove that order, notwithstanding the appeal. *Ibid.*

[To the quarter sessions, to fetch up any proceedings but their orders; as their refusal of a certificate of the loss of malt burnt after duty paid. *Case of Mayo and Parsons*, M. 7 G. Str. 391.]

So, it shall not be granted regularly, after a conviction upon an indictment before judgment. 1 Sal. 149. *Mod. Ca.* 17. 61.

[Nor after appeal to the sessions, pending such appeal. 2 Term Rep. 196.]

[A verdict cannot be removed from sessions, before judgment; and *certiorari*, if granted, shall be quashed. *Rex v. Nicolls*, P. 18 G. 2. Str. 1227.]

And if granted before conviction, and not served till after, or jury sworn, it shall be quashed. *Mod. Ca.* 61.

[The court quashed a *certiorari*, which was issued before, but not served until after judgment on an indictment for a misdemeanor. *Rex v. Seton*, T. 37 G. 3. 7 T. R. 373.]

[After judgment the record can be removed only by writ of error. *Ibid.*]

[Before *certiorari* issues to remove order for quaker's tithes, it ought to be determined, whether the title is really in question or not. *Rex v. Wakefield*, 31 G. 2. 1 B. M. 485.]

If *certiorari* has issued, and the return filed, yet, if it appears that the title is not really in question, the court will order it to be superseded, *quia improvide*, and the return taken off the file. *Ibid.*

[So, if it issues, where it is taken away by act of parliament, (tho' order of sessions refers it to the court by consent of parties,) *superfedeas quia improvide*. *R. v. Micklthwayte*, H. 10 G. 3. 4 B. M. 2522.]

So, it is not usually granted, to remove an indictment for forgery, perjury, or other great offence. 1 Sid. 54.

[If an attorney is indicted at the assizes for a forgery, in altering a fault in a writ under seal, the court will not grant *certiorari*. *Rex v. El*

v. Elford, M. 4 G. 2. Str. 877. Rex v. Basland, H. 17 G. 2, Str. 1202.]

Or, a presentment before justices in *eyre*, before conviction. 1 *Sid.* 296.

[Nor, to a new jurisdiction erected by statute, which has a final authority; if it proceeds according to the statute. 1 *Sid.* 296.]

Nor, usually to a county palatine. 2 *Bul.* 158.

[It cannot be sued out as of course, and without laying a special ground before the court, to remove proceedings in an *action* in the courts of the counties palatine. *Doug.* 749.]

[Nor, to remove such proceedings in the courts of great sessions of *Wales.* *Id.* 751, n.]

So, it shall not be granted, to remove a record in which the king is concerned, without the consent of the attorney-general. *R. Hard.* 409. *Sti.* 295.

[It lies not to remove ejectment from *mayor's court*, but *hab. corp.* and plaintiff declares *de novo*. In *replevin* it lies, and parties do not begin *de novo*. *Barnes*, 421.]

And it seems to be in the discretion of the court, to grant it or not. *Sti.* 126. 211.

[And where an *appeal* lies, the court will not grant a *certiorari*, if the objection be not to the jurisdiction but to the merits, altho' it be otherwise competent for them to grant it. *Doug.* 553.]

(E) When it shall be a *Superfedeas*.

IF a *certiorari* be delivered to a justice of peace, or other justice to whom it is directed, it shall be a *superfedeas*, and every proceeding afterwards is a contempt. *R. Yel.* 32. 1 *Sal.* 148.

And every proceeding afterwards is void. *Per Keble, Attorney-General cont.* 6 *H.* 7. 16. *R. Mar.* 27.

And error lies for it. *R.* 1 *Sal.* 148.

If it be delivered to one justice only, it shall be a *superfedeas* to all. *Yelw.* 32.

Tho' the party does not sue for a removal of the record. *Yelw.* 32.

Tho' the indictment be after the *teste* of the *certiorari*. *Yel.* 32. *R.* 1 *Sal.* 149.

So, if several are indicted, and one of them only brings a *certiorari*, it shall be a *superfedeas* to all of them. *Dub. Mar.* 112.

So, if one only tenders a surety according to the statute, and the others refuse. *R. Mar.* 27.

So, a *certiorari* shall be a *superfedeas* to the justices, tho' delivered after the return passed. *Yel.* 32. *R. Dy.* 245.

When a *certiorari* is granted, the party may have a *superfedeas* out of *Chancery* to the sheriff. *F. N. B.* 237. *E.*

So, the justices of peace ought to award a *superfedeas* to the sheriff *ex officio*. *Qu. F. N. B.* 237. *E.*

(F) When not.

BUT a *certiorari* will not be a *superfedeas*, if no sureties are found, when required by statute. *Mod. Ca.* 33. 43.

Or, if the party does not try the indictment afterwards, according to the condition of the recognizance given. *Mod. Ca.* 43. So,

So, a *certiorari* delivered after the jury are impanelled, and sworn, will not be a *superfedeas* to the taking of the verdict. *R. 1 Sal. 144.*

Or, after a warrant of execution executed by distress, the officer may proceed in the execution. *R. 1 Sal. 147.*

So, after a *certiorari* for an inquisition for a forcible detainer, if there be a new forcible detainer, the justices may record the force, tho' they cannot make restitution. *1 Sal. 151.*

So, a *certiorari* in *Chancery* to remove the tenor of a record, will be no *superfedeas*. *Semb. Skin. 419.*

(G) *Procedendo*.

[If defendant is convicted on confession, and then prosecute or brings *certiorari*, defendant shall have *procedendo*. *Rex v. Gwynne, H. 32 G. 2. 2 B. M. 749.*]

After a *certiorari* returned and filed in *B. R.* no *procedendo* goes. *Mod. Ca. 33. 43. Semb. 1 Sal. 145.—D. cont.* where the cause suggested for the *certiorari* appears false. *1 Sal. 144.*

[If an indictment for felony has been removed into *B. R.* from an inferior court, in order to issue proofs of outlawry upon it, and the party accused come in, *B. R.* will award a *procedendo* to carry the record back. *Rex v. Perry, H. 34 Geo. 3. 5 T. R. 478.*]

[If a defendant, who has been convicted on an indictment in an inferior court, remove the record by *certiorari* into *B. R.* between verdict and judgment, with a view of making objections to the indictment in arrest of judgment, the court will send the record back by *procedendo*, without going into the objections to the indictment. *Rex v. Potter, 2 Ld. Raym. 937. Rex v. Jackson, H. 35 Geo. 3. 6 T. R. 145.*]

[If the party wish to take the opinion of the court on the sufficiency of the indictment, he should remove the record by writ of error after judgment below. *Ibid.*]

[If after a *procedendo* to carry back a cause to an inferior court, the plaintiff recover and then sue out a *scire facias* against the bail below, and they remove the proceeding against them into *B. R.* by *habeas corpus*, the court will award a *procedendo* in the suit against the bail. *Dixon v. Heslop, B. R. T. 35 Geo. 3. 6 T. R. 365.*]

[A cause was removed from an inferior court by an *habeas corpus cum causa*, to which a return was made, stating a custom under which the defendant was sued and arrested; error was suggested on the face of the proceedings below; the court of *B. R.* will not stay the *procedendo* merely on that ground, but will leave the defendant to his writ of error. *Sherborn v. Boslock, B. R. E. 2 Geo. 2. Fitz. 57. Horton v. Beckman, B. R. T. 36 Geo. 3. 6 T. R. 760.*]

When *certiorari* is filed, there must be a motion to take it off the file, previous to motion for *procedendo*. *R. v. Lewis, T. 9 G. 3. 4 B. M. 2456.*

[And it may be superseded *quia improvide emanavit*. *1 Bur. 488, 489.*]

(H 1.) *Superfedeas* to Process.

SO, after a *superfedeas* to any process, all subsequent proceedings are void.

As, after an *habeas corpora juratorum*, if a *superfedeas* be delivered to the sheriff for staying the return of the writ, and he afterwards return it at the assizes, and the trial is had, and judgment upon it; it will be error. *R. 2 Cro. 43.*

(H 2.) When it shall be granted.

A *superfedeas* to process shall be granted, when the party finds surety to appear, and answer to the law: as, in term, it shall be granted out of *C. B.* to a *capias* or exigent, upon surety taken by the sheriff for his appearance at the day. *F. N. B. 236. A.*

So, it shall be granted in the vacation out of *Chancery*, upon surety found there, or to the sheriff. *F. N. B. 236. A. Vide in Chancery (4 Q).*

If the sheriff, &c. do not cease upon a *superfedeas* delivered to him, an *alias*, *pluries*, and attachment go against him. *F. N. B. 236. C. 239. A. 240. B.*

But a *superfedeas*, in respect of privilege to be sued in another court, shall not be allowed, after he has acknowledged the jurisdiction of the court: as, after an *imparlance*. *R. 9 Ed. 4. 53. b.*

Nor, a *superfedeas* to an exigent *quia improvide*; for that recites an appearance. *R. Dy. 33. b.*

Certiorari Bill.

Vide Chancery, (2 O 1.)

CESSAVIT.

(A) When it lies.

BY the *stat. of Gloucester*, 6 *Ed. 1. 4.* if a man lease land to farm, or to find estovers, &c. to a fourth part of the value, and he who holds the farm lets it lie fresh, so that a distress cannot be found for two years: after the two years the lessor may have an action to demand the land in demesne, by a writ which he shall have out of *Chancery*: and if, before judgment, the arrearages and damages are rendred, and surety found to render thereafter, he shall retain his land, &c.

This was the first statute which gave a *cessavit*, 2 *Inst. 295.*

By the *stat. W. 2. 13 Ed. 1. 21. concordatum est eodem modo, si quis detineat domino suo servitium debitum, & consuetum per biennium.*

A writ of *cessavit* lies in the *per*, *cui*, and *post*. *Vide F. N. B. 208. H.*

CESSION.

Vide Esplise, (N 1.)

CESTUY QUE TRUST.

Vide Chancery, (4 B 3, 4.—4 W 32.)

CESTUY QUE USE.

Vide Ufes (I).

CHAIRMAN of a Committee:

Vide Parliament, (E 7.)

CHALLENGE.

(A) A Trial by Jury.

(A 1.) The Antiquity of it.

TRIAL by jury was before the Conquest. *Vide Inquest.*

(A 2.) The Number of Jurors.

The usual number of jurors is 12, for the trial of a cause.

But in an attain, except where the issue is upon a collateral point, there ought to be 24. 2 *Rol.* 673. l. 50.In a grand assise 16; viz. 4 knights and 12 others; so 20 or 12 only. 2 *Rol.* 674. l. 5.In inquests of office there may be more or less than 12: as, in an inquiry of waste. R. 2 *Rol.* 673. l. 53. *Cro. Car.* 414. *F. N. B.* 107. C.

(A 3.) The Qualifications.

Jurors must be *probi & legales homines.* *Vide post.* (C 2.)By the *stat. articuli super chartas* 28 *Ed.* 1. 9. the sheriff shall put in juries, such as be next neighbours, the most sufficient and least suspicious, on pain of double damages.And by the *st.* 34 *Ed.* 3. 4. the next people not suspected, nor procured.

(A 4.) Who are exempted.

But by the *stat. West.* 2. 13 *Ed.* 1. 38. *senes ultra 70 annos, perpetuo languidi vel tempore summonitionis infirmi, vel in patria non commorantes, non ponantur in juratis, aut assis.*And if these are returned, tho' it is not a cause of challenge, they may have an action against the sheriff, without notice of the age, sickness, or non-commorancy; but it is more usual to have a writ *de non ponendis in assis.* 2 *Inst.* 447. *Reg.* 179. b.And if the sheriff does not obey an attachment. *Reg.* 181. a.[So, peers of the realm shall not be sworn on juries. *F. N. B.* 166. A.][So, persons privileged by charters of exemption, shall not be returned, and the affirmative acts of parliament relative to jurors and juries shall not be construed to take away such privilege. *Doug.* 191.][Yet, by *st.* 52 *H.* 3. c. 14. they who have charters of exemption from being impanelled in juries, &c. shall nevertheless be sworn where

where justice cannot be administered without them, saving their liberty at other times.]

[So, clergymen as such are exempted, yet if they have lay fees they may be impanelled on account of them, unless they be in the service of the king, or of some bishop. *F. N. B.* 166. *B.*]

[So, coroners, verderors, foresters, and other officers of the forest. *Id.* 167. *A.*]

[So, tenants in antient demesne shall not be bound to serve on juries out of their own manor. *Id. ibid.*]

[So, physicians are exempted. 3 *Bl. Com.* 364.]

[So, by *§.* 32 *H. 8. c.* 42. members of the united company of surgeons and barbers; but since the separation of these by *§.* 18 *G. 2. c.* 18. the barbers seem not intitled to this privilege.]

[So, barristers, attornies, and other officers of the courts are exempted. 3 *Bl. Com.* 364.]

[Officers on the cheque-roll (as gentlemen pensioners, &c.) have an antient privilege not to be sworn on juries. *Blagney's Case*, *H. 9 G. 2. B. R. H.* 202.]

(B) Challenge to the Array.

THERE may be a challenge to the array, if there be a default or partiality in the sheriff. *Co. L.* 156.

It will be a principal challenge, if the sheriff does not return a knight upon the panel, where a peer appears upon the record to be plaintiff or defendant. *Co. L.* 156. 2 *Rel.* 636. *l.* 53. 2 *Mod.* 182.

Tho' others join with the peer in the action. *Co. L.* 156.

[A knight need not be returned on the panel in ejectment, on the demise of a peer. *Goodtitle v. Thurstout*, *M.* 9 *G. 2. Str.* 1023.]

[By *§.* 24 *G. 2. c.* 18. challenge to the panel for want of a knight, when a peer is party, is taken away.]

So, if the sheriff does not return a knight upon the panel in an attain. *Co. L.* 156.

For more concerning challenge to the array, principal and for favour. *Vide Co. L.* 156, &c.

[After entering into the common rule for a special jury, if one of the parties strikes out hundredors, and at the trial challenges the array for want of hundredors; it is a contempt and attachment shall issue. *Rex v. Burrige*, *P.* 10 *G. 2. Ld. Ray.* 1364. *Str.* 593.]

But if the defendant in an information obtain rule for special jury, tho' prosecutor takes the venire to the sheriff, the defendant may challenge the array if the sheriff has an interest in the cause, and it shall not be contempt. *Rex v. Johnson*, *M.* 8 *G. 2. Str.* 1000.

The party to whom the sheriff is related cannot challenge the array for that reason. *Semb.* But if he does, and there is a demurrer *instant* to that challenge, and before it is determined, the other party, for the sake of expedition, moves to quash the array, the court will do it without the consent of the party challenging. *Kynaston v. Mayor of Shrewsbury*, *H.* 11 *G. 2. Andr.* 85. 104.

[In an action on a by-law, that none but freemen shall keep in a city,

city, it is good challenge that the sheriff is a freeman. *Hesketh v. Braddock*, H. 6 G. 3. 3 B. M. 1847.]

[It is a good cause of challenge if the jury is returned by an under-sheriff, who is attorney in the cause. *Baylis v. Lucas*, B. R. T. 14 Geo. 3. *Corwp.* 112.]

(C) Challenge to the Polls.

(C 1.) Peremptory.

IN high treason, the defendant by the common law, and now by the *stat. 1 & 2 Ph. & M.* 10 (which repeals the *stat. 33 H. 8.* 23. to the contrary) may challenge 35 of the jury, peremptorily without cause shewn. *Co. L.* 156. b.

'Tho' he be outlawed for treason, and the issue be upon a collateral point. *Co. L.* 157. b.

So, if he at first challenge for cause, and the juror be tried and found indifferent, he may afterwards challenge peremptorily. *Co. L.* 158. a.

So, in *petit treason*, or felony by the common law he might challenge 35, which is now restrained by the *stat. 22 H. 8.* to 20, without cause shewn. *Co. L.* 156. b.

So, in an appeal. *Bendl. Pl.* 77. *Mo.* 12.

So, the king by the common law might challenge without cause shewn, when he pleased; but he is now restrained by the *stat. 33 Ed. 1.* *Ord. de Inq.* *Co. L.* 156. b.

And therefore, if he challenge without cause, and others sufficient do not appear, he must shew his cause of challenge. *R. Ray.* 473, 4.

[On an issue on a collateral point, to reverse an outlawry, or avoid an act of attainder, or on any inquest of office, the prisoner has no peremptory challenge. 2 *Hale*, 267. 278. *Barkstead's Case*, 1 *Lev.* 62. *Rex. v. Johnson*, *Str.* 824. *Ratcliffe's Case*, 1746. *Foster*, 40.]

(C 2.) For Cause.

Challenge for cause is principal, or to the favour.

A principal challenge is, 1st, in respect of his dignity, that he is a peer. *Co. L.* 156. b.

And if the party do not challenge him, the peer may challenge himself. *Co. L.* 156. b.

2^{dly}, *Propter defectum*; that he is a villein, or an infant. *Co. L.* 156. b. 157. a. 2 *Rol.* 657. l. 10.

That he is an alien. *Co. L.* 156. b.

But by the *stat. 27 Ed. 3.* 8. an inquest taken before the mayor of the staple, if the parties be strangers, shall be tried by strangers; if denizens, by denizens; if one party be denizen the other alien, one half of the inquest shall be denizens, the other aliens. *Vide Alien*, (C 8.)

So, by the *stat. 28 Ed. 3.* 13. in all inquests before the mayor of the staple, or other justice between merchants or others, tho' the king be party, if there be so many aliens or denizens in the place where the trial is, not parties to the matter; if there are not so many aliens,

aliens, so many as are there, the rest denizens, good men, and not suspicious to either party. *Confirmed by the st. 9 H. 6. 29.*

And therefore an alien, plaintiff or defendant, may pray a *venire per medietatem linguæ*, except in a trial for high treason. *R. Dy. 144. b.*

So, an executor or administrator of an alien, tho' he himself be *indigena*. *Dy. 28. a. in marg.*

And if a full inquest does not appear, the *tales* shall be *per medietatem linguæ*. *R. Popb. 36. Dy. 28. a. in marg.*

Yet, if an alien be joined in a suit with an *Englishman*, or sue as executor or administrator to such an one, he shall not have a *venire per medietatem linguæ*. *Mo. 557. Cro. El. 275. Dy. 28. a.*

And if he does not pray such a *venire*, a challenge for default of aliens is not allowed. *Vide Dy. 28. 144. b.*

So, if the alien does not pray it, the other party may, but he need not. *Dy. 28. a. 144.*

So, if they are returned upon the *venire* as aliens, they cannot be challenged, tho' they are not so. *Dy. 28. a. in marg.*

And a trial *per medietatem linguæ*, where it ought not to be, is not good, tho' by consent; for that shall not alter the law. *Dy. 28. a. in marg.*

Nor, by the *stat. West. 2. 13 Ed. 1. 38. ponantur in assisis vel juratis licet in proprio comitatu qui 20 s. per annum non habeant, nec extra comitatu qui 40 s.*

By the *stat. de non ponendis in assisis*, 21 *Ed. 1.* the sheriff shall not put in recognizances that pass out of the county, and who have not 100 *s. per annum*. And in the county none shall be impanelled to serve before the king's justices on inquests, juries; or other recognizances, who have not 40 *s. per annum*, save that in *eyre*, cities, boroughs, or towns, where juries pass on matters touching the said cities, &c. it shall be done as before.

By the *stat. 2 H. 5. 3. st. 2.* no person shall be admitted in any inquest on a trial of the death of a man, or in a plea real or personal, where the debt or damages are laid to 40 marks, if he have not lands or tenements of 40 *s. per annum* above reprises, so it be challenged, &c. *Vide 35 H. 8. 6.*

Nor, by the *st. 27 El. 6.* if he have not freehold of 4 *l. per annum*, unless in *Wales*, cities or towns, &c.

Nor, by the *stat. 4 & 5 W. & M. 24.* (continued by 7 & 8 *W. 3. 32. 1 Ann. 13. 10 Ann. 14. & 9 G. 8.*) if he have not 10 *l. per annum* in his own name, or in trust in *England*, and 6 *l. per annum* in *Wales* in the same county, freehold, copyhold, or *antient demesne* in fee, tail, or for life of himself or some other, in issues tried before the justices in *B. R.*, *C. B.*, *Exchequer*, assise, *nisi prius*, *oyer and terminer*, gaol-delivery, or general quarter sessions of the peace, &c.

Provided, that the *tales* need have but 5 *l. per annum*; and in *Wales* 3 *l.*; and in cities, boroughs, and towns corporate, as formerly used.

[And by *st. 3 G. 2. c. 25. s. 19.* the sheriffs of the city of *London*, for the time being, shall not return any person to try any issue joined in *B. R.*, *C. B.*, or *Exchequer*, or to serve on any jury at the sessions of *oyer and terminer*, gaol-delivery, or sessions of the peace for the city of *London*, who shall not be a householder within the city, and have lands, tenements, or personal estate to the value of 100 *l.*, and the same matter being alleged as cause of challenge, and so found, shall

be admitted as a principal challenge, and the person challenged shall be examined on oath of the truth of the said matter.]

[And by *f. 20.* sheriffs or other officers to whom the return of jurors belongs for any county, city, or place respectively, shall not return any person to serve on a jury for the trial of a capital offence, who at the time of such return would not be qualified in such respective county, city, or place, to serve as a juror in civil causes for that purpose; and the same matter being taken as cause of challenge, shall be admitted as a principal challenge, and the person challenged shall be examined on oath of the truth of the said matter.]

And any not having so, may be challenged, and on his oath discharged.

Jurors since the *ft. 2 H. 5. 3.* must have 40 *s. per annum* freehold out of *antient demesne*. *Co. L. 156. b. 9 H. 7. 1. b.*

And it is sufficient, if they have it as *cestuy que use*. *Co. L. 272. a. b.*

If the debt and damages together amount to 40 marks, it is within the *ft. 2 H. 5. 3.* for it is in equal mischief. *R. 9 H. 54. b. Vide Co. L. 272. a.*

So, in an avowry, where the issue was *bors de son fee*, tho' the damages are not 40 *s.* *R. per Just. de B. R. & C. B. 9 H. 7. 1. b. 16 H. 7. 14. b. 10 H. 6. 8. a.*

In an action upon the *ft. 8 H. 6. 10 H. 7. 14. a.*

So, by the *ft. 8 H. 6. 9.* none shall be upon the inquests to try a forcible entry, or detainer before justices of peace, unless he hath 40 *s. per annum*.

Nor, by the *ft. 15 H. 6. 5.* to try an attain on a verdict to 40 *l.* value, who hath not 20 *l.* Or, by the *ft. 23 H. 8. 3. 20.* marks *per annum*, or on a verdict to a less value, who hath not 5 marks *per annum*, or 100 *l.* in goods, except in cities or boroughs, &c.

Nor, by the *ft. 1 R. 3. 4.* upon an inquest in the sheriff's turn, or by the *ft. 19 H. 7. 13.* to try riots or routs before justices of peace, unless he hath 20 *s. per annum* freehold, or 26 *s. 8 d. per annum* copyhold.

Nor, by the *ft. 11 H. 7. 21.* upon a jury in any of the courts in London, except he hath lands or goods to the value of 40 marks, or of 100 marks, if the suit be for lands, or for a debt and damages to 40 marks value, or more.

But where the debt and damages do not amount to 40 marks, he shall not be challenged, if he has any freehold. *Co. L. 156, 7. 2^a.* Whether he must not have 20 *s. per annum*? *2 H. 7. 13. b.*

So, before the *ft. 2 H. 5. 3.* in personal actions, where land was not demanded, it was no challenge, that a juror had no freehold; for the *ft. W. 2. 28.* was made for the ease of jurors of small estate only. *17 Aff. 15. Vide Ray. 486. Semb. 10 H. 7. 14. a.*

So, in an information in the nature of a *quo warranto*, it is no challenge, that a juror has not a freehold; for it is out of *2 H. 5. 3.* which provides for a plea between party and party only. *R. per four J. in B. R. to whom three J. in C. B. acc. But a bill of exceptions was filed for it. Ray. 486.*

So, the exception for cities, &c. in the *ft. 15 H. 6. 5.* extends to cities, &c. which are counties. *R. 12 Ed. 4. 13. a.*

So, by the *ft. 11 H. 7. 21.* in an attain in London, the challenge shall not be for want of sufficiency of lands or goods in the jury impanelled,

panelled, the jury being to be returned, by each alderman four, each in substance worth 100 *l.* or more. So, by the *st.* 37 *H.* 8. 5. if each juror be worth 400 marks in goods.

So, in a jury for a trial for high treason, a challenge for defect of freehold is not allowed in *London*; for freehold was not required by the common law; and tho' the *st.* 2 *H.* 5. 3. requires 40 *s.* *per annum* in an inquest for the death of a man, (which seems to be intended in all capital cases,) yet, by the *st.* 1 & 2 *Ph.* & *M.* the trial in high treason was reduced to the common law. *R. per four j. in Lord Russell's Case, 3 Trials, 138.*

But by the *st.* 7 *W.* 3. 3. the trial ought to be by a jury of freeholders.

[If a jurymen in treason, brought to the book, says he has no freehold in the county, he shall be sworn upon a *voire dire* to that matter, and if he answers, he has none, he shall be set aside. *Townley's Case, 1746, Foster, 7.*]

If a jurymen has freehold and copyhold, amounting to 10 *l.* *per annum*, it is a good qualification, tho' the freehold alone is under 10 *l.* *per annum.* *Ibid.*

So, by the *st.* 4 *G.* 2. 7. in *Middlesex*, leaseholders having 50 *l.* *per annum* above ground-rents, or other reservations, shall be obliged to serve on juries, when summoned.

[So, by *st.* 3 *G.* 2. c. 25. *s.* 8. any leaseholder for the term of 500 years absolute, or for any term determinable on life or lives, of the clear yearly value of 20 *l.* *per annum* over and above the rent reserved, is qualified to serve on juries.]

["That a juror is a freeman," is good cause of challenge in an action on a by-law, that none but freemen shall keep shop in a city. *Hesketh v. Graddock, H. 6 G. 3. 3 B. M. 1847.*]

For more concerning challenge to the polls, principal and for favour, *vide Co. L. 156. b. &c.*

CHAMBERLAIN.

High Chamberlain.

Vide Officer, (E 7.)

Chamberlain of *Chester.*

Vide Franchises, (D 5.)

Chamberlains of the *Exchequer.*

Vide Courts, (D 11.)

Chamberlain of *London.*

Vide London (I).

CHAMPERTY.

Vide Maintenance, (A 2, 3.)

CHANCELLOR.

Chancellor:

Vide Chancellor, (31.)—*Justices*, (K 8.)—*Parliament*, (L 32.)—*Visitor*, (A 2.)Chancellor of the *Exchequer*.*Vide Courts*, (D 9.)

CHANCE-MEDLEY.

Vide Justices, (M 19.)

CHANCERY.

(A) The Antiquity of the Chancery.

(A 1.) As to the Court of Pleas.

Argument on jurisdiction of Chancery. THE court of Chancery is an original and fundamental court, as antient as the kingdom itself. *Per Hob.* 63.

The British and Saxon kings had their chancellors and courts of Chancery. 4 *Inst.* 78. *Arg.* 1 *Ch. R.* 5. *. *Wilsint* was chancellor to *Athelstan*. 1 *Ch. R. Arg.* 5.

The first authentic mention of a chancellor was anno 920, *temp. Edw. Senioris, qui fecit Turketil abbatum Croiland cancellarium suum.* *Seld. Off. Canc. f.* 1. 1 *Ch. R. Arg.* 5.

And many kings of the Saxon lineage before the conquest had their chancellors. *Seld. Off. Canc. f.* 1. 4 *Inst.* 78.—As *Edmund*, *Edred*, *Edgar*, *Etheldred*, and *Alfred*. 1 *Ch. R. Arg.* 5, 6.

Rembald was chancellor to *Edward the Confessor*; and several are cited before him. 1 *Rol.* 384. l. 10. *Maurice* was chancellor to *William the Conqueror*. 1 *Rol.* 384. l. 15. 4 *Inst.* 78. *Seld. Off. Canc. f.* 3.

(A 2.) As to the Court of Equity.

But tho' the court of Chancery, as to the ordinary jurisdiction, which is governed by the rules of the common law, is so antient, (for to that the antient authors and the *stat.* 36 *Ed.* 3. 9. refer,) yet the court of equity is of later date, and seems to have its commencement upon the introduction of uses: the first decree there was 17 *R.* 2. which are frequent in the time of *H.* 4. increase in the time of *H.* 5. and *H.* 6. under the cardinals *Beauford*, son of *John of Gaunt*, and *Kemp*, and are more numerous in the time of *H.* 8. under Cardinal *Wolsey*. 2 *Inst.* 552, 3. 4 *Inst.* 82, 3. [*Mitford's Chanc. Plead.* 1.]

Yet the court of equity there is said to be as antient as the kingdom. *Hob.* 63.

And by the *stat.* 14 *Ed.* 3. *Rot. Parl. nu.* 33. if nothing be done upon the ordinance then made, it is provided, that the chancellor of England hear the complaint by bill, and proceed as he uses to do in writs of *subpœna* in Chancery. 1 *Rol.* 372. E. And

And *Rot. Parl.* 45 *Ed.* 3. *nu.* 24. the Commons pray, that none who proceed there by bill be delayed, as they have been. 1 *Rol.* 372. *l.* 25.

And the court of equity seems coeval with the other courts of *Westminster*. 1 *Ch. R. Arg.* 10. 12 *Co.* 114. *Eq. Abr.* 129.

(A 3.) *It cannot now be erected.*] The king cannot grant a court of conscience, as *tenere placita*; for a court of pleas is directed by the ordinary rules of law, a court of conscience not, but is uncertain and unlimited, and therefore cannot be erected but by act of parliament, or prescription. *R. Perrot's Case*, 36 [26] *El. B. R.* 4 *Inst.* 87. 97. *Vide Prærogative*, (D 28.)

And *dub.* whether it be good by prescription; for that presupposes a grant; and the court of *Chancery*, which is held by prescription, is a fundamental court. *Hob.* 63. 2 *Rol.* 109. *R.* that it is not good by prescription for *York*, or other small corporation. 2 *Rol.* 266. *l.* 20.

But *London* may claim it by prescription. *R.* 2 *Rol.* 266. *l.* 15.

So, the king cannot by commission appoint any one to determine matter of equity; for it ought to be determined in *Chancery*, and such commission would be illegal and void. *R.* 12 *Co.* 114.

So, if the king constitutes a chancellor of a duchy, or other precinct, that does not give him authority to hold a court of equity, 2 *Lev.* 24.

(A 4.) Where held.

The court of *Chancery* was usually held *in curia regis*; and therefore the process there is returnable *coram rege in cancellaria sua*. *Mad.* 131. 2 *Inst.* 316.

(B) Officers of the Chancery:

(B 1.) Lord Chancellor.

THE principal officer of the *Chancery* is the lord chancellor.

Temp. Ethelberti dicitur referendarius; ego referendarius subscripsi. *Seld. Off. Ch. f.* 1.

The chancellor is created by the delivery of the seal, and taking his oath. 4 *Inst.* 87.

Sometimes by letters patent. 4 *Inst.* 87.

This office may be granted for life, or *durante bene placito*. *Mad.* 43.—Not for life. 4 *Inst.* 87.

But not in succession. 4 *Inst.* 78.

Cancellarii dignitas est ut secundus a rege in regno habeatur. *Seld. Off. Ch. f.* 3. *Diët. in vitâ Tho. Becket.* 4 *Inst.* 78.

By the *st.* 31 *H.* 8. 10. the chancellor, or keeper, hath precedence of all nobility, except the royal blood. [*Qu.* As to the archbishop of *Canterbury*?]

The chancellor is superior to all the judges of the kingdom. 1 *Ch. R. Arg.* 13.

Cancellarius dicitur a cancellando; because upon a *scire facias* he cancels the patents of the king. 4 *Inst.* 88.

The chancellor and *custos sigilli* antiently were one officer.

Sigillum regium ad ejus pertinet custodiam. *Diët. in vitâ Tho. Becket.* *Seld. Off. Ch. f.* 3. 4 *Inst.* 78.

And tho' they have been sometimes divided since the time of *H. 2.* *Seld. Off. Ch. f. 4.* *1 Rol. 385. l. 25, &c.*

Yet by the *stat. 28 H. 3.* it was enacted, *si rex abstulerit sigillum cancellario, quicquid fuit interim sigillatum irritum habeatur.* *Seld. Off. Ch. f. 4.*

By the *stat. 5 El. 18.* the lord keeper ever had, and shall have like place, authority, jurisdiction, and advantages as the lord chancellor. *Semb.* by most of the Judges. *3 Inst. 113, 114.*

By the *stat. 1 W. & M. 21.* commissioners of the great seal shall exercise like authority, jurisdiction, and use the like customs, privileges, and advantages as the lord chancellor and keeper; and have precedence after peers, and the speaker of the House of Commons; or, if a peer, according to peerage.

And now there cannot be a lord chancellor and lord keeper at the same time; for, by the *stat. 5 El. 18.* they are declared to be the same office. *4 Inst. 88.*

The chancellor or keeper is made by the delivery of the great seal to him by the king, and taking his oath. *4 Inst. 87.*

The lord chancellor, or keeper, cannot make a deputy. *4 Inst. 88;* but this was allowed, when the office was granted for life. *Mad. 44.*

By the *stat. art. super chart. 28 Ed. 1. 5.* the lord chancellor and the justices of the King's Bench shall follow the king, so that he may have at all times near him some sages of the law able to order all matters which shall come to the court.

Cancellaria dignitas est ut omnibus regis adsit conciliis, etiam non vocatus. *Seld. Off. Canc. f. 3.*

So, the chancellor may hear causes in *B. R.* or *C. B.* *2 Inst. 552, 3.*

[A person may be lord chancellor and lord chief justice of *B. R.* at the same time, and lord *Hardwicke* continued so from 20th *Feb.* to 7th *June.*]

When the king's charters and pleas in the king's courts increased, and the power of the chief justicier declined, the office of chancellor rose to great eminence. *Mod. 42, 3.*

(B 2.) *His oath.*] The chancellor was sworn that he should not sell, deny, or delay a remedial writ or right. *1 Rol. 384. l. 35.*

And the usual oath requires, that he shall well and truly serve the king and his people in the office of chancellor; that he shall do right to all people, poor and rich, after the laws and usages of the realm; that he shall truly counsel the king, and his counsel laine (*i. e.* hide) and keep; that he shall not suffer the hurt or disherison of the king, or that the rights of the crown be decreased, as far as he can let it; and if he cannot let it, shall make it expressly known to the king, with his advice and counsel; that he shall do the king's profit in all he reasonably may. *4 Inst. 88. 3 Rusb. 1102.*

(B 3.) *And duty.*] And therefore, if a chancellor sell a writ remedial, it is a great abuse. *1 Rol. 384. l. 30.*

A chancellor, upon the removal of a record before him by *certiorari*, when any one is found guilty of homicide by misadventure, or *se defendendo*, shall grant him a pardon without a warrant from the king, or excommunication with him. *2 Inst. 316.*

Vide post. (C 1, 2.)

(B 4.)

(B 4.) Master of the Rolls.

Ad cancellarium pertinet rotuli qui est de cancellaria custodia per suppositam personam. Seld. Off. Chan. f. 3.

And his office is as antient as the court itself.

In the 23 Ed. 1. a grant was made *Ada de Osgodby*, by the chancellor *ex parte regis*. *Dugd. Orig. Jud. Chronica Series*, 33.

And such grant was, *ita quod custodiam habeat eodem modo, quo alii custodes habere consueverunt.*

It is said, that the master of the rolls by his commission cannot make a decree, without the assistance of two masters. *1 Ver. 274.*; but this does not appear by the decretal order there recited.

[It appears that the master of the rolls has a judicial authority in two distinct capacities, from the ancient constitution of his office;]

[1st, As master of the rolls, sitting at the rolls, and from his decrees in that capacity, there lies an appeal to the chancellor in court;]

[2d, As *leum tenens* of the chancellor *virtute officii*, without any special commission, and then he sits in court for the chancellor, and his decrees are of the same force as those of the chancellor himself.]

[When he sits by virtue of a special commission, there are others joined with him, whose concurrence may be necessary. *Vid. Sir Joseph Jekyl's Treatise on the Office of Master of the Rolls passim.*]

[In order to make up for the deficiencies in the accounts of the masters in Chancery mentioned (B 5.) a stamp-duty of 6d. on certain writs had been laid on certain writs by *stat. 12 G. 1. c. 33.*, which was to continue for 16 years; but the money raised under that act not being sufficient, the same duty was continued for 4 years longer by *stat. 9 Geo. 2. c. 32.*; and in that time, there being a surplus of 13,698*l.* in the bank, and the revenue of the hanaper-office, from which certain fees and salaries were paid to the lord chancellor, master of the rolls, masters in Chancery and other officers, not being sufficient to answer these demands, a great portion of this surplus was directed by *stat. 23 G. 2. c. 25.* to be paid to the creditors of the office; the duties were made perpetual, and from the produce of them 3000*l.* directed annually to be paid into the hanaper-office, to answer the ordinary demands on the said office, and for the payment of 1200*l.* a-year to the master of the rolls.]

[Part of the revenue of the master of the rolls arose from the estate within the *liberty* of the rolls: the houses of which this estate principally consisted having fallen to decay, he was empowered by *stat. 12 Car. 2. c. 36.* to make leases for 41 years, or for any less term, of these houses (except the chapel, mansion-house, garden, stable, coach-house, and other out-houses and buildings fit for the habitation of the master of the rolls); and within 7 years of the expiration of these leases, the then master of the rolls, and his successors, were empowered to make new leases for 21 years, from the date of them, reserving a rent not less than had been reserved on the former ones, payable to the then master and his successors: under this power leases had been made, on which the rent reserved, and payable in succession, amounted in 1777 only to 135*l.*; whereas the improved rent, which was so contrived, as to go to the master making the lease, and his personal representatives, amounted at that time to 1977*l.* The *stat. 17 G. 3. c. 59.* orders an equivalent to the then

master of the rolls, and the residuary legatee of the *late one*, for their several interests in this sum; that the estate should be put under the management of a receiver, with a salary of 50 *l.*, who should pay to the master of the rolls the clear yearly sum of 1250 *l.* out of the rents and profits, discharge the land-tax, and place the surplus to the *account of the rolls' estate*, in the bank, in the name of the accomptant-general, in order to answer the repairs of the estate, and other contingent demands.]

[The court of King's Bench will certify in a case sent from this court. *Daintry v. Daintry*, B. R. T. 35 Geo. 3. 6 T. R. 307.]

(B 5.) Masters of Chancery.

There are twelve masters of *Chancery*, assistant to the chancellor or keeper. *Vide Practical Register in Chancery*, 236.

Cancellario associantur clerici honesti, &c. Regi jurati, qui in legibus & consuetudinibus Anglicanis noticiam habent plenioram, quorum officium sit querelas, &c. audire & examinare & debitum remedium exhibere per brevia regis. Fleta, l. 2. c. 13. 2 Inst. 407.

And by commission a judge frequently hears causes in *Chancery*.

But if the masters in *Chancery* disagree to the opinion of the judge, there shall be no decree; for they are equal in commission. *Semb. 1 Ver. 265.*; but it is said that this does not appear by the decree.

A master in *Chancery* shall not be answerable for a security approved by him, if there was no corruption in him, altho' it prove defective. *R. 2 Ver. 90.*

[The masters in *Chancery* had antiently the custody and management of the monies and other property of suitors paid in by order of the court; but some of them having, previous to the year 1725, been found greatly deficient in their accounts, the lords commissioners at that time made an order, which was also confirmed with additions by the succeeding chancellor in the same year, for all monies in their hands, and all that should afterwards be paid into court, to be paid into the bank, under certain regulations mentioned in the orders. The *stat. 12 Geo. 1. c. 32.* recites and approves of these orders, and in addition appoints a new officer, under the name of accomptant-general, to have the sole management of the property of the suitors, instead of the masters, under the same regulations with respect to the payment of it into the bank, &c. as were appointed by the orders with respect to the masters; no salary however is appointed him, but he is enjoined to be satisfied with the fees usually paid the masters.]

[In consequence of this regulation, however, a large sum of money belonging to the suitors having accumulated, and then lying dormant in the bank, it was provided by *stat. 12 Geo. 2. c. 24.* that out of that sum, 33,000 *l.* should be vested in government securities, and out of the interest, a salary of 650 *l.* be paid to the accomptant-general, 250 *l.* to his first clerk, and 120 *l.* to his second, and these salaries to be in lieu of all fees.]

[By *stat. 4 Geo. 3. c. 32.* 5000 *l.* out of the same fund are directed to be placed out in the same manner for raising a salary for a third clerk of 120 *l.* in lieu of all fees.]

[By *stat. 5 Geo. 3. c. 28.* a sum not exceeding 80,000 *l.* from the same fund is directed to be laid out in the same manner; and out of the

the interest 200 *l.* a-year to be paid to each of the eleven masters of Chancery, of whom the accomptant-general is commonly one.]

[By *stat.* 9 *G.* 3. *c.* 19. a sum not exceeding 20,000 *l.* from the same fund is directed to be laid out in the same manner: and from the interest, an addition to be made to the salary of the accomptant-general of 250 *l.*, to that of his first clerk 50 *l.*, to that of his second clerk 40 *l.*, and a salary for a fourth clerk of 120 *l.*]

[Out of the same funds, by *stat.* 14 *Geo.* 3. *c.* 43. and 15 *Geo.* 3. *c.* 22. & 56. sums are ordered to be raised for the purchase of ground and rebuilding the offices for the accomptant-general, the register, and the six clerks.]

[Money in the funds, belonging to the wards of the court, cannot be transferred into the name of the accomptant-general to the credit of the cause, until the account be taken by a master, and his report made. 1 *Brown Ch. Rep.* 56.]

(B 6.) The Register.

The register is an officer of note, who has many deputies, who take notice of all orders and decrees made by the court. *Vide Practical Register in Chancery*, 254. 310.

These orders he ought to draw up, enter in his office, sign, and deliver to the parties. *Ibid.* 254, &c.

He ought to take the orders as the court pronounces them. *Ibid.* 255.

He ought to recite the first order (if there be such) in the subsequent one. *Ibid.* 257.

If the order be out of a general rule, he ought to recite the reasons for making it. *Ibid.* 257.

If the order be for a reference to arbitrators after the hearing, he ought to mention the opinion of the court, unless the court otherwise directs. *Ibid.* 260.

(B 7.) The Six Clerks.

The six clerks are the only attornies to the court of Chancery, and the others are under clerks to them. *Ord. per Clarendon. Rules and Orders of Chancery*, 110. *Vide Practical Register in Chancery*, 60.

All the proceedings, upon bill and answer, to the decree, and sometimes after the decree, belong to their office. *Vide Practical Register in Chancery*, 60.

Copies of the bill, answer, depositions, or other record, which belong to the six clerks to make, ought to contain fifteen lines in every sheet, written plainly and fully. *Ord. per Cla. Rules and Orders of Chancery*, 104. *Vide Practical Register in Chancery*, 113.

And no such copy shall be delivered out of the office, till signed by the six clerk or his deputy. *Ord. per Cla. Rules and Orders of Chancery*, 104. *Vide Pract. Reg. in Chan.* 64. 113.

Nor, shall it be used in court, or before a master. *Ord. per Cla. Rules and Orders of Chancery*, 104. *Vide Practical Register in Chancery*, 113.

All pleadings, commissions, and certificates which belong to them, shall be immediately delivered to the six clerk, who is the attorney in the cause, or to his deputy; nor shall they before that be opened by any under-clerk. *Ord. per Cla. Rules and Orders of Chancery*, 107.

No bill, pleading, commission, or decree, shall be carried by any under-clerk out of the office, to be ingrossed, copied, or inrolled: and after the ingrossment, &c. the original shall be remitted to the fix clerk, to whose custody it belongs. *Ord. per Cla. Rules and Orders of Chancery*, 107.

[A clerk in court, who lends money to a solicitor, cannot retain a client's papers as a pledge for it. *Grey v. Cockeril*, *M.* 1740, 2 *Atkyns*, 114.]

[A fix clerk is not obliged to deliver up papers till he is satisfied his fees, tho' the client has paid them to the solicitor, and he to the fix clerk who absconds. *Taylor v. Lewis*, *M.* 1750, 3 *Atkyns*, 727.]

[A clerk in court has a lien on the duty recovered by him, which extends to collateral proceedings, as well as to decree; and this shall not be defeated by a voluntary release from his client, tho' a release for consideration shall defeat him. *Anon. T.* 1750, 2 *Vesey*, 25.]

[The court will not make a purchaser appoint a clerk in court, which is necessary only where the party is to appear. *Child v. Lord Abington*, 1 *Ves. jun.* 94.]

[Under the order 18 June 1668 regulating the office of fix clerks, they are entitled to receive their proportion of the fee from the sworn clerk, tho' he has given credit to the client. *Ex parte the Six Clerks*, 3 *Ves. jun.* 589. *before the Lord Chancellor and Master of the Rolls.*]

[A fix clerk cannot be changed at pleasure. *Taylor v. Lewis*, *M.* 1750, 2 *Vesey*, 111.]

(B 8.) Warden of the Fleet.

The warden of the Fleet is an officer of this court, and attends to receive all persons it shall commit to his custody.

Vide Imprisonment (D).

(B 9.) Other Officers.

As to the examiners, *vide post.* (P 1, &c.)

As to the curfitors, and other officers, *vide* 4 *Inst.* 82.

(C) The Jurisdiction of the Chancery.

(C 1.) Ordinary, according to the Common Law.

IN the Chancery there are two courts; the ordinary, where the chancellor or keeper proceeds according to the common law. 4 *Inst.* 79. *Eq. Abr.* 127.

The style of this court is, *coram domino rege in cancellariâ*, 4 *Inst.* 80. 2 *Inst.* 552.

Out of this court issue all original writs. 4 *Inst.* 80. *Eq. Abr.* 128.

All commissions that pass the great seal. 4 *Inst.* 80.

Deeds are there inrolled. 1 *Rol.* 372. *H.*

Statutes, which empower the chancellor to hear and determine offences, intend this court. 4 *Inst.* 81, 2.

This court holds plea upon attachment of privilege, for the clerks and officers of the Chancery 4 *Inst.* 79, 80. 1 *Rol.* 371. l. 30.

In an *audita querela*, or *scire facias* in the nature of an *audita querela*,

rela, to avoid executions of the court of *Chancery*. 4 *Inst.* 79. *Eq. Abr.* 128.

In petitions, and *monstrans de droit*. 4 *Inst.* 79. *Eq. Abr.* 128.

In a *scire facias* to annul patents. 4 *Inst.* 79. 88. 2 *Vent.* 344.

In a *scire facias* upon a recognizance in this court. 4 *Inst.* 79. *Eq. Abr.* 128.

Upon a statute-staple, or recognizance upon the statute 23 *H.* 8. 4 *Inst.* 79. 1 *Rol.* 371. l. 30.

In a *scire facias* upon letters of reprisal. 1 *Ver.* 54.

In dowments made in *Chancery*. 4 *Inst.* 79. *Eq. Abr.* 128.

In partitions. 4 *Inst.* 79.

In traverses of office. 4 *Inst.* 79. *Eq. Str.* 128.

In debt, or trespass against the officers of the court. *D.* 20 *H.* 6.

32. b. 1 *Rol.* 371. l. 30.

And in all personal actions for or against such officers and ministers of the *Chancery*. 4 *Inst.* 80. *Eq. Abr.* 128.

But this court does not hold plea of land. *D.* 20. *H.* 6. 32. b. *Eq. Abr.* 128.

And therefore, where a woman sued for a jointer in the *Chancery* of *Chester*, a prohibition was granted. 1 *Sid.* 189.

The chancellor is the sole judge in this court. 4 *Inst.* 80. [*Vid. Sir Joseph Jekyl*, that the master of the rolls has a judicial authority in this court.]

The proceedings there are in *Latin*. *Eq. Abr.* 128.

And are not inrolled, but remain in *filaciis*, filed in the office of the petty-bag. 4 *Inst.* 80.

If there be a demurrer in this court, it shall be determined by the chancellor. *Ibid.*

If issue be joined, the chancellor, &c. delivers the record with his own hand to *B. R.* to be there tried: but after trial, it shall be remanded, and judgment given in *Chancery*. 4 *Inst.* 80. *Vide* 1 *Rol.* 372. l. 35. *Vide* *Latch*, 3. *Vide infra*.

And both courts are but one for this purpose. 4 *Inst.* 80.

After issue, a *venire* out of *Chancery*, *quorum quilibet habeat 4 libratas terra*, will be well. *Al.* 14.

And the *venire* shall be awarded in *Chancery* returnable in *B. R.* *Ibid.*

If the issue arises in a county palatine, *Ireland*, &c. the chancellor ought to deliver the record to *B. R.*, and they write to the county palatine, *Ireland*, &c. to try and return it to *B. R.* *Latch*, 3. *R. per three J.* *Jon.* 82. *Vide* 3 *Bul.* 305.

But the chancellor cannot write to the county palatine, *Ireland*, &c. to try the issue. *R. Latch*, 3.

Nor, can he transmit the record to be tried in *C. B.* *Latch*, 3.

Yet if the issue is to be tried by certificate, the chancellor may write to the bishop, &c. *Latch*, 3. *Vide* *Jon.* 83.

After issue tried in *B. R.* or in a county palatine, &c. and thither returned, *B. R.* shall give judgment upon it, and it shall not be remanded to the *Chancery*. *Latch*, 3. *Eq. Abr.* 128. *Vide supra*.

So, though only the tenor of the record, upon which the issue was, be removed into *B. R.*, and a trial upon it. *R. Al.* 17.

So, if there be a demurrer for part, and issue for other part in *Chancery*, the whole record shall be delivered to *B. R.*, and judgment there

there upon the demurrer, as well as upon the issue. *R. 2 Sand. 23. Eq. Abr. 128. R. in Cha. Eq. Abr. 129.*

If the record be delivered by the clerk of the petty-bag, it will be well removed; for that may be said to be *propria manu* of the chancellor, which is done by his officer. *R. Mich. 1700, Eq. Ab. 128, 9.*

Upon a judgment in *Chancery*, error lies in *B. R. 4 Inst. 80. Dy. 315.*

But the lord keeper said, he would award an injunction upon such a writ of error. *1 Ver. 131. [1 Eq. Ca. Abr. 129. 3 Bl. Com. 48. in notis.]*

But a mispleading in form there will not be prejudicial in any case, altho' it be in a matter where the court of Chancery holds plea according to the common law. *1 Rol. 372. l. 45.*

(C 2.) Extraordinary Jurisdiction.—Court of Equity.

The court of equity is not a court of record. *4 Inst. 84. 37 H. 6. 14. b. Yelv. 227.*

The proceeding there is by *English* bill. *4 Inst. 84. [Mitf. Chan. Plead. 6, 7.]*

And it has jurisdiction properly in three cases, viz. in matters of fraud. *1 Rol. 374. l. 10. Vide post. (3 F 1.—3 M 1.)*

In case of accident. *1 Rol. 374. l. 10. Vide post. (Z).*

In matters of trust or confidence. *1 Rol. 374. l. 10. Vide post. (4 W 1.)*

But *Chancery* does not aid contrary to a maxim in law, unless in case of a fraud, &c. *1 Rol. 375. Qu. R. Vide post. (3 F 8.)*

Nor, contrary to a statute. *1 Rol. 378. S. Vide post. (3 F 7.)*

Tho' the party was ignorant that his act would have such an effect in law. *1 Rol. 374. l. 21.*

[Bill by the Nabob of the *Carnatic* against the *East India Company* founded on political treaties between them dismissed, not being a subject of municipal jurisdiction. *Nabob of the Carnatic v. East India Company, 1 Ves. jun. 371. 2 Ves. jun. 56. 4 Bro. Ch. Ca. 180. Decree affirmed in Dom. Proc. 1797.]*

[The court has jurisdiction *in personam* on equity arising out of transactions concerning lands abroad, particularly if in the *British* dominions. *Lord Cranstown v. Johnston, at the Rolls, 3 Ves. jun. 170.]*

[The spiritual court has exclusive cognizance of the rights and duties arising from the state of marriage; a court of equity, therefore, has no jurisdiction on a contract for separation between husband and wife simply, much less when it will affect a purchaser or creditor; but the jurisdiction holds in special cases, as where a third party covenants to indemnify the husband against the wife's debts, or a fortune accrues to the wife after separation, or the property is the subject of a trust. *Legard v. Johnson, 3 Ves. jun. 352.]*

[Bank-stock was purchased by the government of *Maryland* before the *American* war, and vested in trustees for the discharge of certain bills: after the peace, on a bill under an assignment by the new state of part of the stock, as a compensation to mortgagees of lands that were confiscated, the fund, subject to that assignment, was claimed by the new state; and there being no claim under the bills, the whole was claimed by the surviving trustee beneficially; and also by the proprietary under the old government, and a specific lien was insisted on in respect of losses by confiscation occasioned by the refusal of

of trustees to transfer; held, that there was no lien; that the new state could take only such rights of the old as were within their jurisdiction; that the claims of the plaintiff, the state, and in respect of the confiscations were the subjects of treaty, not of municipal jurisdiction; and the fund, no object of the trust existing, must be at the disposal of the crown. *Barclay v. Russell*, 3 *Ves. jun.* 424.]

[The court cannot decree against a title in the crown apparent on the record, tho' not insisted on at the hearing. *Ibid.*]

[The practice of a court of law, compelling a plaintiff on a bond not to take execution beyond his real debt, does not oust the jurisdiction of this court in awarding an injunction. *Codd v. Woden*, 3 *Bro. Ch. Ca.* 73.]

[Tho' a court of law will permit a plaintiff to declare upon a bond which is lost; that does not oust the concurrent jurisdiction of this court. *Atkinson v. Leonard*, 3 *Bro. Ch. Ca.* 218.]

(D) Process.

(D 1.) Subpœna.

[A Person who is made party defendant to a bill, tho' not served with process, may appear gratis, and refer it for impertinence. 2 *Brown. Ch. Rep.* 279.]

If a man commences a suit in equity, the first process is a *subpœna*, introduced in the time of *R. 2.* *Seld.* 6 vol. 1544.

Which may be returnable on a day certain; as, *die Jovis prox. post quinden. Paschæ.*

Or, on a common return day; as, *die Paschæ prox. futur. in unum mensem.*

If *Easter* be passed, it shall be *die Paschæ in unum mensem prox. futur.* *Vide Practical Register in Chancery*, 340.

It may be returnable in the mayor's court. 1 *Ver.* 406.

Or, in the *Chancery* in Ireland; but then no attachment issues here for a contempt. 1 *Ver.* 406. 420.

A *subpœna* may be sued before a bill filed. *Ord. per Clarendon.* *Vide Rules and Orders of Chancery*, 94.—*Cont.* by the *stat. 4 & 5 Ann.* 16. except to stay waste, or suits at law.

The charge for one or two defendants is 2s. 6d. at the *subpœna* office; for three or more defendants, 3s.

By the *stat. 15 H. 6. 4.* a *subpœna* shall not be granted, till surety found to satisfy the party grieved, his damages and expences, if the matter of the bill be not made good.

Process for contempt ought to be sued in the county where the party resides. *Per Ord. 7 Car. 1.* 1 *Ch. R.* 56. *Vide Rules and Orders of Chancery*, 11.

The *subpœna* ought to be served before the return.

Or, before noon, or the rising of the court on the day of the return. *Vide Practical Register in Chancery*, 343.

A *subpœna* is well served, when the plaintiff or another shews the writ to the defendant, and leaves it with him. *Vide Prac. Reg. in Chan.* 341.

Or, leaves the label, or a note containing the day of appearance; for if there are several defendants, such label or note is left with the first, the writ with the last. *Vide Prac. Reg.* 341, 2. *Vide Rules and Orders in Chancery*, 96.

[But

[But if there be but one defendant, leaving the label, and shewing the *subpœna*, is not regular service, the *subpœna* itself should be left. 3 *Atk.* 567.]

Or, leaves such writ (but it is a doubt when he leaves only the label or note) with any of the family, at the house of the defendant. *Vide Pract. Reg. in Chan.* 341, 2. *Vide Rules and Orders of Chancery*, 96.

Or, leaves it the house of his usual residence, or puts it in at the window, when the defendant absconds, *Vide Pract. Reg. in Chan.* 342. *Vide Rules and Orders of Chancery*, 96.

By an order in the *Exchequer*, a *subpœna* to answer, rejoin, or hear judgment, ought to be served personally, or left at the dwelling-house or residence of the defendant, with one of the family; or the writ under seal shall be shewn to such one of the family, and a ticket left with him, containing the effect of the writ; and in a *subpœna* to answer, shall be written in the *Exchequer* hand in parchment. *Vide Rules and Orders in the Exchequer*, 1 *Rule* 1.

If there are two defendants, who sue the plaintiff in a foreign court, and one of them is beyond sea; service upon the other within the realm, is good for him. *Ordered upon motion*, *Ca. Ch.* 67.

[Service on an agent, formerly a partner, ordered to be good service on a defendant abroad. *Carrington v. Cantillon*, *P.* 1722, *Bunb.* 107.]

When a defendant was beyond sea, a *subpœna ad audiendum judicium* was served upon the clerk in court, by order of the court upon motion.

If a man sues a *feme-covert*, a *subpœna* shall go against the husband and wife.

Except where the husband is out of the kingdom, or other special cause.

If the *subpœna* be shewn to the husband, with notice that it is also against his wife, it is sufficient for both. *Vide Pract. Reg. in Chan.* 343.

[If a mother secretes infants, parties, service on her is sufficient. *Smith v. Marsbal*, *M.* 1740, 2 *Atkyns*, 70.]

But shewing the writ, without leaving it, or the label or note, is not sufficient, except where the defendant refuses it. *Vide Pract. Reg. in Chan.* 343.

A *subpœna* for costs must be served upon the person; for the costs ought to be demanded. *Vide Ord. per Cla. Rules and Orders of Chancery*, 95. *Vide Pract. Reg. in Chan.* 344.

But upon *affidavit*, that the person cannot be found, the court, upon motion or petition, will order a service upon the clerk in court. *Vide Ord. per Cla. Rules and Orders of Chancery*, 95. *Vide Pract. Reg. in Chan.* 344.

[If defendant, nor his clerk in court, nor any attending at his office, can be found, the court may order service of *subpœna* to hear judgment to be good, on defendant's solicitor, tho' he knows not where defendant is, with copy of the order at defendant's last abode. *Anon. T.* 1750, 2 *Vesey*, 23.]

Yet tho' the service be not sufficient for an attachment, it may be sufficient for costs, if the defendant takes notice of it, and the plaintiff does not file his bill. *Vide Pract. Reg. in Chan.* 343.

A counter-

A counterfeit *subpœna* does not oblige. *Vide Pract. Reg. in Chan.* 17.
And whoever serves it, if he knows it, misbehaves himself, and an attachment goes against him.

So, he who serves a *subpœna* upon a different person, unless it be by mistake.

Or, misbehaves himself in the service. *Vide Pract. Reg. in Chan.* 99.

Or, abuses, or is guilty of a contempt on him who serves it. *Ibid.*

[By *stat. 5 G. 2. c. 25.* if any defendant, against whom any *subpœna* or other process shall issue, do not cause his appearance to be entered according to the rules of the court, on affidavit to the satisfaction of the court, that such defendant is beyond sea, or that on inquiry at the usual place of his abode, he could not be found, so as to be served with such process; and that there is just ground to suspect that he is gone out of the realm, or has absconded, to avoid being served with the process, the court may make an order, directing such defendant to appear at a certain day therein named; and a copy of such order shall within fourteen days after be inserted in the *London Gazette*, and published on some *Sunday* immediately after divine service, in the parish church of the parish where the defendant had his usual abode, within 30 days next before his absenting; and a copy of such order shall within the same time be posted up in some public place at the Royal Exchange in *London*, if the order be made in the Chancery, Exchequer, or Duchy-chamber of *Lancaster*, at *Westminster*; if in any of the courts of equity of the counties palatine of *Chester*, *Lancaster*, and *Durham*, or of the great sessions in *Wales*, then at some public place in some market town within the jurisdiction of the court in which such order is made, and nearest to the place where the defendant makes his usual abode as aforesaid, such place of abode being also within the jurisdiction of the said court: and if the defendant do not appear within the time limited, or within such further time as the court shall appoint, then on proof of such publication, the court being satisfied of the truth of it, may order the plaintiff's bill to be taken *pro confesso*, and make such decree as may be thought just; and issue process to compel performance, either by immediate sequestration of the real and personal estate of the party so absenting, if any such can be found, or such part as may be sufficient to satisfy the demand of the plaintiff; or by causing possession to be delivered to the plaintiff, or otherwise, as the nature of the case shall require: and the court may likewise order the plaintiff to be paid his demand out of the estate so sequestred, according to the true intent and meaning of such decree, the plaintiff giving security to abide such order, touching the restitution of such estate or effects, as the court shall think proper to make concerning the same, on defendant's appearance, to defend the suit, and paying such costs to the plaintiff as the court shall order; but if the plaintiff refuse to give such security, the court shall order the estate sequestred, or whereof possession shall be decreed to be delivered, to remain under the direction of the court, either by appointing a receiver, or otherwise, till the appearance of the defendant, or until such order shall be made as the court shall think just. *s. 1.*]

[Provided, that if any decree be made in pursuance of this act, against any person out of the realm, or absconding at the time such decree is pronounced, who within seven years after shall return or be-
come

come publicly visible, he shall be served with a copy of the decree, within a reasonable time after his return or public appearance shall be known to the plaintiff; and if within seven years after the making of such decree, defendant die before his return or public appearance, or shall die in custody before being served with a copy of the decree, then his heir, in case of real estate sequestred, or possession of it delivered, if such heir may be found, or if the heir be *feme-covert*, infant, or *non compos mentis*, the husband, guardian, or committee of such heir, respectively; or in case of sequestration or possession delivered of personal estate, then the executor, &c. shall be served with a copy of the decree within a reasonable time after it shall be known to the plaintiff that the defendant is dead, and who his heir, &c. is. *f. 4.*]

[Provided, that if any person served with a copy of such decree, do not within six months after appear and petition to have the cause re-heard, the decree shall stand absolutely confirmed, as against every one claiming under the defendant. *f. 5.*]

[Provided, that any one served shall within six months after service, or not being served, shall within seven years after the decree, appear and petition to be heard, and pay down, or give security for paying such costs as the court shall think reasonable, such person, or his respective representatives, shall be admitted to answer; and all proceedings shall be had, as if no former decree or proceedings had been had in the same cause. *f. 6.*]

[But defendant, &c. not appearing within seven years, and complying with the provisions of the act, shall be absolutely barred. *f. 7.*]

[Provided, that no proceedings shall be warranted by this act, unless it appear by *affidavit*, before the making of the decree, that the defendant had been in *England*, within two years next before the *subpœna* issued against him. *f. 8.*]

[Nor, in any court of equity, of limited jurisdiction, unless before the making of the decree it appear to the satisfaction of the court, by *affidavit*, that defendant had resided within such limited jurisdiction, within one year next before the *subpœna* issued against him. *f. 9.*]

[Where the defendant is in a distant prison, and does not appear, the court will not order the bill to be taken, *pro confesso*, for want of an appearance, without a *habeas corpus*, tho' it be suggested that the demand is so small that it will not bear the expence of bringing him up. 3 *Atkyns*, 690.]

[Where the bill has been ordered to be taken *pro confesso*, merely putting in an answer is not sufficient to set aside the order. 2 *Brown. Ch. Rep.* 279.]

[Defendant being outlawed, motion that he might appear within a limited time on the equity of the *stat. 5 Geo. 2. c. 25.* granted, tho' he had not been in the kingdom for two years before the *subpœna*. *Anon. 2 Ves. jun.* 188.]

[If the minister of a parish prevent an order for defendant's appearance, being published pursuant to 5 *G. 2. c. 25.* he may be indicted. *Burton v. Mattons*, *M.* 1740, 2 *Atkyns*, 114.]

If the plaintiff do not proceed in the cause for a year, he ought to have another *subpœna ad faciendum attornatum*. 1 *Ver.* 172. *Vide Pract. Reg. in Chan.* 350. A sub-

A *subpœna* issues for various causes; as, *ad respondendum*. *Vide* the form, *West. Chan. sect. 21. Vide Pract. Reg. in Chan. 339.*

Ad testificandum at the assizes, or upon a commission, &c. *West. f. 34. 42. 49, &c. Vide Pract. Reg. in Chan. 347.*

For costs. *West. f. 21. Vide Pract. Reg. in Chan. 344. Vide Rules and Orders of Chancery, 95.*

For the delivering or producing of evidences or other writings. *West. f. 44, 5. Vide Pract. Reg. in Chan. 346.*

Ad rejuvendum, or, *ad audiendum judicium*. *Vide Pract. Reg. in Chan. 346. 349. Vide Rules and Orders of Chancery, 94, 5. Vide West. f. 30. 37.*

The penalty of 100*l.* in the *subpœna* mentioned, is only in *terrorem*, and shall not be levied, tho' the defendant does not appear. 10 *H. 7. 4, 5.*

[On amended bill, it is not necessary to serve new *subpœnas* on the original defendants. *Angerstein v. Clarke, 1 Ves. jun. 250. Skeffington v. —, 4 Ves. jun. 66.*]

(D 2.) Letter to a Peer.

If the defendant be a peer, a *subpœna* does not go, but a letter from the chancellor, requiring him to take a copy of the bill, and to answer at such a day. *West. f. 21. 2 Vent. 342. Vide Pract. Reg. in Chan. 341.*

[It gives the party suing it out, priority of suit. *Price v. Ld. Coningsby, H. 1722, Bunb. 124.*]

But if he does not answer upon the letter, then a *subpœna* shall issue. 2 *Vent. 342. Vide Pract. Reg. in Chan. 341.*

If he do not appear upon the *subpœna*, then an order shall be awarded to shew cause why a sequestration should not go. 2 *Vent. 342.*

And if no cause be shewn, a sequestration goes. 2 *Vent. 342.*

So, by the *st. 12 & 13 W. 3. 3.* process against a peer, or member, &c. during time of privilege, shall be by letter, or *subpœna*, as usual, and on leaving a copy of the bill at the defendant's house, or last place of abode, if he do not appear or answer, or perform not the order, decree, &c. a sequestration of real and personal estate shall go, as in case of a peer before.

But no process for a contempt shall issue against a peer. 2 *Vent. 342.*

And therefore an attachment does not go. *Seld. 6 Rol. 1543.*

(D 3.) Attachment.

If the defendant does not appear at the return of the *subpœna*, and the bill be filed, the plaintiff, upon an *affidavit*, positive and certain of the time and place of service, and of the time of the return, shall have an attachment. *Vide Pract. Reg. in Chan. 20.*

If the *affidavit* be filed before the return of the attachment, it is sufficient. 1 *Ver. 172.*

But an attachment shall not be prayed till the day after costs day. *Vide Pract. Reg. in Chan. 8.*

And the *affidavit* ought to shew, that the service, being within London, or twenty miles distance, was above four days past exclusive. *Vide Pract. Reg. in Chan. 20.*

If beyond twenty miles distance, that it was above eight days. *Vide Pract. Reg. in Chan.* 20.

And that he served the *subpœna*, or saw the service of it. *Vide Pract. Reg. in Chan.* 342.

Or, that the defendant confessed himself to have been served. *Ibid.*

[In all cases of commitment there must be an affidavit of service; a recital in an order for time obtained by the offender is not sufficient. *Whitbed v. Thistlethwaite*, H. 1747, 3 *Atkyns*, 619.]

By an order in the *Exchequer*, an attachment goes, if the defendant does not appear the next day after service, where the process is returnable *immediatè*, upon the second day after, if returnable at a day certain, and upon the fourth day after, if upon a common return. *Vide Rules and Orders in the Exchequer*, 2. Rule 4.

If the husband appears, and not his wife, an attachment goes against both. *Vide Pract. Reg. in Chan.* 18. 343.

The attachment requires the defendant to answer for the contempt, as well as to the matters objected. *Vide West. s. 22. Vide Pract. Reg. in Chan.* 20.

And it lies for any contempt; as, for not answering, or for answering insufficiently.

[If a husband, by menaces, prevails with his wife to put in an answer contrary to her belief, it is a contempt. *Ex parte Halsam*, T. 1740, 2 *Atkyns*, 50.]

[On an insufficient further answer, you take up your process of contempt, just where you left off. *Child v. Brabson*, M. 1750, 2 *Vesey*.]

For refusal to obey an order or decree.

[A waiver of irregularity in process by appearance does not relate back, so as to bring the defendant into contempt for not appearing in time. *Robinson v. Nash*, 1 *Anst.* 76.]

[Decree for debt and costs: attachment for the debt alone held good. *Frazer v. Thoburn*, 2 *Anstr.* 380. Subsequent attachment for the costs also held good. *Ibid.* 413.]

[Special return to an attachment for not appearing, that defendant is in prison for felony, the plaintiff must proceed in the usual way by *habeas corpus*. — *v. Kirkpatrick*, 3 *Ves. jun.* 471. Motion for *habeas corpus* accordingly; but lord chancellor afterwards directed the order not to be drawn up. *Ibid.* 573.]

[If a defendant attends the hearing of a cause, and is present when the decree is pronounced, and does any act in contravention to it, he is guilty of contempt, and shall be punished for it, tho' the decree is not drawn up. *Skip v. Harwood*, T. 1747, 3 *Atkyns*, 564.]

[Disobedience to an injunction is a contempt, tho' it is not sealed. *Anon.* T. 1747, 3 *Atkyns*, 567.]

For abusive usage or words, of the process, or officers of the court.

If upon a copy served, and the writ shewn, the person speaks with contempt, before he knows the contents, or from what court it issued, it will be a contempt. *R. Mod. Ca.* 43.

For the revocation of a submission to an award made in court by consent. 1 *Ca. Ch.* 185.

For not performing an award made upon a reference by rule of court. *Vide Arbitrament*, (D 1.)

And where the contempt is by abusive words against the process of the court, an attachment goes without an hearing. 1 *Sal.* 84. If

If the contempt be confessed or proved, it shall be referred to the master to tax the costs of the prosecutor; and the party offending shall be committed till he pays them, and gives satisfaction to the court for the misdemeanor. *Rules and Orders in the Exchequer*, 16. Rule 40.

But if the master be in doubt what report to make, he may be afterwards examined upon interrogatories. *Per Cur. P. 2 Ann.*

If the contempt be by abusive actions, the offender shall be committed upon an *affidavit* without other examination. *Ord. per Cla. Rules and Orders of Chancery*, 116.

As, by beating, &c. the person who serves the process. *Ibid.*—So, in the *Exchequer*. *Rules and Orders in Exchequer*, 16. Rule 40.

If by contemptuous words, he shall be committed upon two *affidavits*, without other examination. *Ord. per Cla. Rules and Orders of Chancery*, 116.—So, in the *Exchequer*. *Rules and Orders in Exchequer*, 16. Rule 40.

And one *affidavit* is sufficient to have an attachment, upon which he shall be discharged, if there be no more proof, and the contempt be denied; but he shall not have his costs in respect of this *affidavit*. *Ord. per Cla. Rules and Orders of Chancery*, 116.—So, in the *Exchequer*. *Rules and Orders in Exchequer*, 16. Rule 40.

[There must be the oaths of two persons of contemptuous words, or beating a person serving process, for the court to order commitment; on the oath of one, they will only make order to shew cause. *Anon. T. 1745, 4 Atkyns*, 219.]

In *B. R.* interrogatories shall be exhibited in four days, or the party shall be discharged. *Mod. Ca.* 73.

If the contempt be apparent, he shall answer in custody. *Mod. Ca.* 73.

Otherwise, upon a recognizance. *Mod. Ca.* 73.

And if he denies upon the interrogatories, he shall be discharged, tho' he may be indicted for perjury. *Mod. Ca.* 73.

If the defendant be taken for a contempt, he shall appear *de die in diem* in the register's office to be examined upon interrogatories. *Vide post.* (D 6.) *Vide Pract. Reg. in Chan.* 101.

And this upon motion is referred to a master; but it is usually done by the examiner. *Vide Pract. Reg. in Chan.* 102, 3.

If the defendant comes in *gratis*, he shall give notice of his appearance to the clerk on the other side. *Vide Pract. Reg. in Chan.* 103.

And if interrogatories are not framed within eight days, he shall be discharged, with costs to be taxed by a master.

So, if being examined, there shall be no reference of the examination, nor commission taken on the other side, nor witnesses examined for proof of the contempt, within a month. *Vide Pract. Reg. in Chan.* 103.

If the interrogatories go to matter not contained in the *affidavit*, or order, the defendant may demur, or refuse to answer to them. *Ord. per Cla. Rules and Orders of Chancery*, 114.

And if the contempt be not proved, the defendant shall be discharged upon motion, with costs.

If the contempt be by abusive words, &c. he may be committed directly.

[Chancery has no cognizance of a libel, unless it is a contempt of the court. *Read v. Huggonson*, *M.* 1742, 2 *Atkyns*, 469.]

Initial letters, or even figured names, if the meaning be apparent, will not protect a libeller. *Read v. Huggonson*, M. 1742, 2 *Atkyns*, 469.

It is no excuse for a printer to say, he had no knowledge of the contents of a libel. *Ibid.*

If the printer discovers the person who brought the libel to him, it is a mitigation of his offence. *Ibid.*

There are three sorts of contempt; scandalizing the court itself, abusing parties concerned in causes here, and prejudicing mankind before the cause is heard; thus, printing a brief before the cause was heard, was deemed a contempt in *Capt. Parry's* case, as prejudicing the world with regard to the merits. *Ibid.*

Read was ordered to be committed, and *Huggonson*, already a prisoner, to be taken into close custody, for printing reflections on the parties in the cause of *Roach v. Hall*, tho' they spoke of the court with respect. *Ibid.*

[If the printer of a newspaper inserts a paragraph, tending to prepossess the minds of people, as to the proceedings in this court, it will commit him for contempt. *Anon.* Case of *Mrs. Farley*, Printer of *Bristol Journal*, for an advertisement relating to *Sir Robert Cann's* answer, T. 1754, 2 *Vesey*, 520.]

[On submission, payment of costs, and confessing the author, the court will discharge him. *Ibid.*]

[Printing an order of court, appointing a receiver, and reciting the material facts in the cause, and distributing it among the tenants, merely to prevent their paying their rents improperly, till a receiver was appointed, is not a contempt, but not a practice to be approved. *Baker v. Hart*, M. 1742, 2 *Atkyns*, 488.]

So, if after appearance he departs without examination, upon motion and certificate of the departure, and of the interrogatories. *Rules and Orders of Chancery*, 113. *Vide Pract. Reg. in Chan.* 103.

So, if he be found in contempt. *Ord. per Cla. Rules and Orders of Chancery*, 113.

The register shall give the certificate of the departure; the examiner, that interrogatories are exhibited. *Vide Rules and Orders of Chancery*, 113. *Vide Pract. Reg. in Chan.* 103.

And he shall not be discharged until he performs the order and pays the costs; and tho' he be cleared, he shall not have costs. *Ord. per Cla. Rules and Orders of Chancery*, 113. *Vide Pract. Reg. in Chan.* 204.

The master, upon the reference of the examination, or proof of the contempt before him, shall certify, without more, the costs to be paid of either party. *Ord. per Cla. Rules and Orders of Chancery*, 115. *Vide Pract. Reg. in Chan.* 106.

If the contempt be denied, or be not apparent upon the examination, the prosecutor shall have a commission of course; but the defendant shall have one commissioner, and cross-examine the witnesses. *Ord. per Cla. Rules and Orders of Chancery*, 114. *Vide Pract. Reg. in Chan.* 104.

But he cannot examine the witnesses, but by leave of the court upon special points, which the plaintiff may cross-examine. *Ibid.*

[In great contempts the court will give leave to examine witnesses to falsify the party's examination, and to the party to examine witnesses

nesses to fortify his denial of the contempt. *Wilkins v. Edson, M. 1727, Bunb. 244.*]

If the contemptors are aged, servants, &c. a commission shall go into the country, at the charge of him who prays it, to be executed when and where the six clerk, not in the cause, upon hearing of the clerks on both sides, shall appoint. *Ord. per Cla. Rules and Orders of Chancery, 115. Vide Pract. Reg. in Chan. 105.*

An attachment, and all process for contempt, shall be made out into the county where the party is resident; if he resides in London, it shall be directed to the sheriffs there. *Ord. per Cla. Vide Rules and Orders of Chancery, 112. Vide Pract. Reg. in Chan. 111.*

Whoever sues any process for a contempt, ought to endeavour the execution of it; otherwise he shall lose the benefit of it, and pay costs. *Ord. per Cla. Rules and Orders of Chancery, 112, 113. Vide Pract. Reg. in Chan. 112.*

The court will discharge an attachment or other process of contempt, when it issues irregularly, with costs to be taxed by the six clerks, without motion. *Ord. per Cla. Rules and Orders of Chancery, 112, 113. Vide Pract. Reg. in Chan. 111.*

But the defendant ought to pay the costs of the process, which issued regularly first. *Ord. per Cla. Rules and Orders of Chancery, 112. Vide Pract. Reg. in Chan. 111.*

If the sheriff do not return the attachment, a day shall be given for it. *Vide Pract. Reg. in Chan. 110, 111. 334.*

And if he do not make a return on such day, he shall be amerced. *Ibid.*

So, if he make a false return. *Vide Pract. Reg. in Chan. 334.*

So, in the *Exchequer*, he shall be amerced 40s. if he does not return it by the sealing day, upon a rule given the last day of the term. *Rules and Orders in Exchequer, 17. Rule 46.*

So, if a sheriff or under-sheriff be served with a copy of an order under the seal of the court; upon *affidavit* thereof, and a warrant from a baron, he shall be in contempt. *Rules and Orders in Exchequer, 17. Rule 44.*

The plaintiff pays 2s. 10d. for the attachment; to the sheriff 2s. 4d., and for the return 4d.

If the king dies after the arrest upon an attachment, and then the sheriff returns *cepi corpus*, it will be well, and the subsequent process upon it regular. *1 Ver. 400.*

If the sheriff returns *cepi corpus*, a messenger shall be sent for the defendant. *1 Ver. 116. 154. 344. 400.*

But this is a new officer subordinate to the serjeant at arms. *1 Ver. 344.*

And the proper course, after a *cepi corpus* returned, is a motion that the defendant enter his appearance and be examined within four days, otherwise that he may stand committed; for, after a *cepi corpus*, no other process of contempt issues. *1 Ver. 344.*

If after an arrest upon an attachment, and a *cepi corpus* returned, the defendant escapes out of the kingdom, a serjeant at arms shall be granted; and, upon return, a sequestration. *1 Ver. 344.*

If the defendant appears, being personally served, upon the attachment, and files his answer, or demurrer, the attachment shall be discharged of course, on payment of 20s. costs, or tender and refusal.

Ord. per Cla. But said, that he shall not be discharged without motion or petition. *Ord. per Cla. Rules and Orders of Chancery*, 113. *Vide Pract. Reg. in Chan.* 112.

Upon payment of 10s. if the *subpoena* was not served upon the person.

[If defendant is in custody for want of answer, answers, is discharged, answer reported insufficient, taken again, answers again; he shall be discharged on payment of costs of contempt, without staying in custody till the master reports whether the answer is sufficient or not. *Child v. Brabson*, M. 1750, 2 *Vesey*.]

And if the plaintiff sues other process, after tender of the costs, the defendant shall be discharged with costs. *Ord. per Cla. Rules and Orders of Chancery*, 113. *Vide Pract. Reg. in Chan.* 112.

If the contempt be pardoned, the defendant may appear and proceed, as if there had been no process. *Ca. Ch.* 238.

If the defendant be taken on the attachment, he shall be bailed. *Vide Pract. Reg. in Chan.* 110.

[If the sheriff takes bail-bond for the appearance of a person in custody on attachment, and delivers it to plaintiff, this is good cause on a rule why he does not bring in the body; and plaintiff may have a messenger into any county where the person is. *Anon. H.* 1742, 2 *Atkyns*, 507.]

And the attachment may be superseded.

Or, if it be irregularly obtained, it shall be discharged upon motion.

[If a solicitor has been negligent in managing his client's business, the court may grant an attachment against him. *Floyde v. Nangle*, T. 1747, 3 *Atkyns*, 568.]

[Where a person, against whom an attachment is prayed in the King's Bench, by his affidavit fully denies the charge on which the rule for an attachment was granted; the court always refuses the attachment without entering into the credit of the parties, or the probability of the evidence; for if the defendant is hardy enough to swear falsely, he is left to be punished by indictment: but in *Chancery* they proceed differently, for there they examine the defendant on interrogatories, and also examine witnesses on both sides, and then decide upon the truth of the charge. *Rex v. Vaughan, Douglas*, 516.]

(D 4.) Attachment with Proclamation.

If the defendant be not taken, or does not appear upon the attachment, the plaintiff shall have an attachment with proclamation. *Vide Pract. Reg. in Chan.* 101. 296.

The charge to the officer is 2s. 10d., to the sheriff 2s. 4d., for the return 4d.

So, by order in the *Exchequer*, if the defendant does not appear upon the return of the attachment. *Vide Rules and Orders in Exchequer*, 2. Rule 5.

If the defendant be arrested upon a proclamation, a commission of rebellion, or by a serjeant at arms, where the first process was not duly executed, the plaintiff shall pay costs. *Per Order*, 7 Car. 1. 1 *Ch. R.* 57. *Vide Rules and Orders of Chancery*, 12. *Vide Pract. Reg. in Chan.* 112.

If the defendant appear upon the proclamation, and file his answer, plea, or demurrer, he shall be discharged upon payment of costs, double to the costs upon an attachment without motion, and if the plaintiff afterwards proceed, he shall pay costs.

If the defendant be taken, he shall be committed to the Fleet. *Vide Prac. Reg. in Chan.* 101.

(D 5.) Commission of Rebellion.

If the defendant be not taken, or does not appear upon the proclamation, the plaintiff shall have a commission of rebellion. *Vide* the form, *West. f.* 24. *Vide Pract. Reg. in Chan.* 94. 101.—So, by order in the *Exchequer*. *Vide Rules and Orders in the Exchequer*, 2. *Rule* 5. 19. *Rule* 51.

This commission shall be directed to the sheriff. *Vide Pract. Reg. in Chan.* 94.

Or, to special commissioners named by the plaintiff. *Vide West. f.* 23, 4. *Vide Pract. Reg. in Chan.* 94.

If the commissioners permit the defendant to escape, they may be committed till they produce him. *Vide Pract. Reg. in Chan.* 95.

If the escape be with their consent, till they pay the debt. *Ibid.*

If the defendant be rescued, the rescuers may be committed. *Ibid.*

If *A.* says that he is the person named in the writ or commission against *B.*, by which means the commissioners take him, an attachment lies against him. *Semb. Hard.* 323.

But if the commissioners take a wrong person, an action lies against them for the false imprisonment. *Hard.* 323.

Tho' he acknowledge himself to be the person. *Hard.* 323.

If the commissioners take the defendant, they may bail him, or not, at their discretion. 1 *Ch. R.* 261, 2. *Vide Pract. Reg. in Chan.* 95.

If they refuse bail, they ought to bring him up to the court directly, without delay. 1 *Ch. R.* 262. *Vide Pract. Reg. in Chan.* 95.

[On the common process of the court, the commissioners ought to take bond for defendant's appearance; but on attachment for contempt they ought not, but to have the body in court at the return. *Jones v. Clement, in Sc. M.* 1719, *Bunb.*]

And a bailiff who acted contrary, was committed for the contempt, and paid costs to the defendant. 1 *Ch. R.* 262.

If the defendant be taken upon a commission of rebellion, which issued regularly, the defendant shall have costs. 1 *Ver.* 269.

But if an action at law be brought, an injunction goes; for it ought to be examined in *Chancery*. *R.* 1 *Ver.* 269.

(D 6.) Serjeant at Arms.

If the defendant be not taken upon the commission, a serjeant at arms shall be sent for him. *Vide Pract. Reg. in Chan.* 101. 332.

By an order in the *Exchequer*, if the defendant does not appear upon the return of the commission of rebellion, there shall be such other proceedings as the court upon motion shall direct. *Rules and Orders in Exchequer*, 2. *Rule* 5.

If he appears, all costs for the contempt shall be paid, before any other proceeding on his part shall be allowed; as, 10 s. for every person named

named in the attachment, for every one in the proclamation 20s., for every one in the commission of rebellion 2*l.* 13*s.* 4*d.* *Vide Rules and Orders in Exchequer*, 2. Rule 5. 19. Rule 51.

And all costs shall be paid in court by the plaintiff or defendant, or their respective attorney, before appearance or answer. *Vide Rules and Orders in Exchequer*, 3. Rule 5.

If the sheriff returns *cepi*, and the defendant is not brought into court, upon a rule of four days, upon motion a messenger shall be sent for the defendant. *Vide Rules and Orders in Exchequer*, 3. Rule 5.

By an order in the *Exchequer*, upon process of contempt in *London* or *Middlesex*, there shall be six days between the *teste* and the return; in other counties within sixty miles, ten days; in all others, fifteen days, if the court does not direct process returnable *immediate*. *Vide Rules and Orders in Exchequer*, 3. Rule 5.

If there be a debate, whether the process for the contempt was served, there may be a commission for the examining it. 2 *Ca. Ch.* 100.

If the defendant appears and pays costs for his contempt, and afterwards is again in contempt for not making a sufficient answer, the process of contempt continues against him; but when he pays for all contempts, there shall be a deduction of so much as he paid upon the former contempts. *Vide Rules and Orders in Exchequer*, 7. Rule 16.

Process of contempt continues, and does not begin again *de novo*. *Per Rule of North, Ca. Ch.* 238.

If the defendant be in custody for his contempt, he shall be brought to the court upon a *habeas corpus*, and charged with the bill; if he does not then answer, he shall be a second time brought to the court by *habeas corpus*, and charged with the bill, or by rule of court; and if still he does not answer, the bill shall be taken *pro confesso*. *Vide Rules and Orders in Exchequer*, 8. Rule 18.

[By *stat. 5 G. 2. c. 25. s. 2.* if any defendant be brought into court, by writ of *habeas corpus*, or other process issuing out of any court of equity, and refuse or neglect to enter his appearance, according to the rules of the court, or to appoint a clerk in court or attorney of such court to act in his behalf, the court may appoint a clerk in court or an attorney to enter his appearance for him, and such proceedings may be had in the cause, as if the party had actually appeared.]

[Provided, that if a decree be made against such defendant who shall be in custody, or forthcoming, so that he may be served with a copy of such decree, then he shall be served with a copy thereof before any process shall be taken out to compel the performance thereof. *s. 3.*]

If a person in contempt be put to answer upon interrogatories to excuse his contempt, he shall be committed to the Fleet, unless he gives a recognizance in 100*l.* or more (if the case requires it) to appear *de die in diem* to be examined, and not to depart without licence of the court. *Rules and Orders in Exchequer*, 15. Rule 38.

If upon examination he denies the contempt, or it does not appear; if the court, upon motion, be informed of a fact that can demonstrate it, the prosecutor may examine witnesses to it, in court,
or

or by commission, upon notice to the defendant or his attorney, who may cross-examine them. *Rules and Orders in Exchequer*, 15.
Rule 38.

If there be such a commission, the defendant shall have a day to appear till the return; and if it be not returned within a week after the day for the appearance, he shall be dismissed with costs, and his recognizance shall be vacated. *Rules and Orders in Exchequer*, 15.
Rule 39.

If the prosecutor does not exhibit interrogatories within four days after appearance, the defendant shall be dismissed with costs. *Rules and Orders in Exchequer*, 15. *Rule 38.*

If process of contempt be not executed, it will abate by the death of the king, and the plaintiff shall begin *de novo*. 1 *Ver.* 300. *Vide Abatement*, (H 38.) (*Contra*, by the *st.* 1 *Ann.* 8.)

(D 7.) Sequestration. *Vide post.* (Y 4.)

If the serjeant at arms cannot take the defendant, or if he escapes and persists in his contempt, a sequestration shall be awarded for the lands or goods of the defendant at the time of his contempt. *Vide Pract. Reg. in Chan.* 101. 329.

A sequestration is the necessary process of the court. *Ca. Ch.* 93. Tho' introduced by Lord *Bacon*. 1 *Ver.* 421.

And may be awarded against the lands and goods of the defendant. *Ca. Ch.* 92.

But it shall not be granted upon petition. *Ord. per Cla. Rules and Orders of Chancery*, 123.

[Sequestrators, for want of appearance, after seizure of some goods, ought to apply to court for further directions for seizure: sequestrators, for want of answer, have no power to sell, or even to remove goods; and if they do, an attachment may go against them. *Debbrow v. Crommie*, M. 1729, *Bunb.* 272.]

If, before the sequestration awarded, the defendant have conveyed his land by covin, the sequestration shall be awarded against the defendant and his assigns. 2 *Ca. Ch.* 44.

And the person to whom the land is assigned, may be taken upon the sequestration. 2 *Ca. Ch.* 44.

So, if land be settled, with a power of revocation, it will be subject to the sequestration. 1 *Ca. Ch.* 242.

Tho' the decree was for payment of money, not for land, and the sequestration was for of land at the time of the decree. *Ca. Ch.* 242.

A sequestration binds from the time of awarding it, not of the execution only. 1 *Ver.* 58.

If the suit be for land, a sequestration shall be granted, and also an injunction for the profits, directed to the sheriff, or other commissioners specially appointed. *Vide Pract. Reg. in Chan.* 329.

Where the suit was against a corporation for a debt due in their corporate capacity, (and against particular persons of the same corporation, against whom, upon demurrer, the bill was dismissed,) and the corporation did not appear; upon an appeal to the lords in parliament from the decree for the dismissal and the answer, plea and demurrer of the particular persons, (but the corporation, tho' summoned, did not appear,) the lords ordered, that the bill, as to the corporation,

poration, should not be dismissed, that the court of *Chancery* should award the usual process, and, if needful, a *distringas*, which should be served one month before the return; and if the corporation did not appear, or did not answer, that the bill should be taken *pro confesso*, and the court of *Chancery* should make a decree accordingly. *Ca. Ch.* 206. *Vide* 1 *Ver.* 121, 122.

[A defendant, prisoner in the country, for want of appearance to a bill of revivor, cannot on his own motion have the bill taken *pro confesso* against him, but plaintiff must pursue the directions of 5 G. 2. c. 25. *Anon. M.* 1748, 3 *Atkyns*, 690.]

If again the defendant appears, and afterwards does not answer, and all process of contempt goes; the bill shall be taken *pro confesso*, and a decree accordingly. *R.* 2 *Ca. Ch.* 173. 237. *Vide* 1 *Ver.* 247.

[If there is a sequestration *nisi*, against a member of parliament for want of answer, and before it is made absolute, answer comes in, and is excepted to, the court will enlarge him till it appears, whether answer is sufficient or not; or else will grant new sequestration *nisi*. *Butler v. Rastfield*, T. 1751, 3 *Atkyns*, 740.]

[If the bill be taken *pro confesso* for want of an answer after appearance, the decree shall be *nisi*. *Semb. Sed qu.* *Howell v. Lord Coningsby*, M. 1726, *Bunb.* 219.]

[If defendant is brought up three times, and does not put in any answer, and the bill is thereupon taken *pro confesso*, he shall not be permitted afterwards to put in an answer. *Hughes v. Owen*, P. 1731, *Bunb.* 299. *Qu.* How this agrees with *Howell v. Ld. Coningsby*? *supra*.]

If process goes against one defendant to a sequestration, the plaintiff shall afterwards proceed against the others, tho' jointly concerned, without him who has sued to a sequestration; as, when one defendant is outlawed at common law. 2 *Ca. Ch.* 139.

[If one defendant is out of the kingdom, it is in vain to take out process, and it is the same thing as if process had been taken out for want of appearance, and carried on to a sequestration. *Darwent v. Walton*, H. 1742, 2 *Atkyns*, 510.]

If after a sequestration the goods are embezzled by a stranger, he shall be examined for his contempt. 2 *Ca. Ch.* 82.

But a decree in *Chancery* does not bind the right of the land, but only the person, if he does not obey it. 1 *Rel.* 373. l. 25. 4 *Inst.* 84.

And if the bill be against husband and wife, and the wife appears without the privity of the husband, the bill shall not be taken *pro confesso*. 1 *Ver.* 247.

And therefore, the court cannot impose a fine for non-performance of a decree. *R.* 4 *Inst.* 84.

Nor, decree damages for not delivering possession. *R.* 3 *Bul.* 34.

Yet, there may be a decree for quieting the possession. *R.* 3 *Bul.* 34.

So, a sequestration in mesne process determines by the death of the party. 1 *Ver.* 58.—If it be for a personal duty. 1 *Ver.* 166.—Otherwise, if it be after a decree. 1 *Ver.* 58. [*Hawkins v. Crook*, M. 1747, 3 *Atkyns*, 594.]

So, a sequestration upon a bill, for a personal duty, does not avoid the

the dower of the wife, tho' the sequestration was before marriage. *R. 1 Ver. 118.*

So, sequestrators upon mesne process account for the profits, and retain only for satisfaction of the contempt. *1 Ver. 247, 8.*

[If a defendant stands out to a sequestration for want of answer, and the bill is taken *pro confesso*, and a decree *ad computandum*, the court will not discharge the sequestration on paying costs of the contempt, but keep it on foot as a security for his appearing before the master. *Maynard v. Pomfret, H. 1746, 3 Atkyns, 468.*]

[The court will not make an order on a plaintiff to pay his sequestrator's fees, who has made no return of the goods sequestred, but has delivered them over many years before, and made no demand on plaintiff since. *Hawkins v. Crook, M. 1747, 3 Atkyns, 594.*]

[If plaintiff calls for account of goods sequestred, the sequestrator may set off his fees, whatever length of time has elapsed without demand, provided he has made a return from time to time, of what he seized. *Ibid.*]

[*Quare*, Whether there can be any sale of goods taken under a sequestration on mesne process, further than to pay the expences? *Hales v. Shaftoe, 1 Vef. jun. 86.* The motion in S. C. refused, *3 Bro. Ch. Ca. 72.*]

[Bill for an account taken *pro confesso* against surviving executor, and devisee in trust, and leasehold estates taken under a sequestration for want of an answer: the court would not order the sequestrators to sell, but directed them to apply the profits. The court also ordered the dividends of money in the bank on the testator's account to be paid under the will, but could not order the bank to transfer before the act 36 Geo. 3. c. 90. *Shaw v. Wright, 3 Vef. jun. 22.*]

[Appointment of a receiver in place of the sequestrators, discharges the sequestration. *Ibid.*]

[The court will sell perishable commodities, rents paid in kind, or the natural produce of a farm, under a sequestration. *Ibid.*]

[A privileged person is not in contempt, unless he neglect to obey the order *nisi* for a sequestration. *Smallbrooke v. Lord Donnegal, 3 Anstr. 647.*]

[Service of such an order on the defendant's clerk in court is good. *Ibid.*]

(D 8.) Injunction.

(D 8.) *The force of it.* An injunction out of Chancery cannot supersede the proceedings of B. R. *Vide 37 H. 6. 13, 14.*

And therefore, the court will give judgment, if it be prayed, notwithstanding an injunction. *R. 22 Ed. 4. 37. b.*

And if the injunction be not upon the attorney, he may pray it. *Dist. 22 Ed. 4. 37. b.*

But if a person, served with an injunction, afterwards proceed at common law, it is a contempt to the Chancery, and he will be committed. *Semb. 22 Ed. 4. 37.* Yet there it was said *per Hussy*, that B. R. would grant a *habeas corpus* and dismiss him.

[But now, a court of law will take such notice of an injunction, that the defendant shall have no advantage against the plaintiff for not proceeding

proceeding within the time allowed by the rules of the court, if the delay was occasioned by the defendant's obtaining an injunction.]

[Thus where the defendant moved to set aside an execution taken out upon a judgment after a year and day without *scire facias* to revive the judgment, and it appeared that the execution had been prevented by an injunction out of *Chancery*, the court discharged the rule with costs. 2 *Bur.* 660.]

It shall be served in the same manner as a *subpœna*. *Vide Pract. Reg. in Chan.* 197.

And if, after service it shall be disobeyed, all process for contempt issues, till the offender be taken and committed upon an *affidavit* of his disobedience. *Vide Pract. Reg. in Chan.* 217.

And when he is taken he shall be committed, till he obey, or give security for his obedience, and shall not be heard in the principal case, until he obey. *Ibid.*

If execution be taken out, after an injunction, the party shall make restitution for all damage that appears to be done to the plaintiff by his *affidavit*. 1 *Ver.* 207.

No one shall be restrained by an injunction, if he be not named.

But if it be served upon the attorney, &c. and the defendant afterwards proceed himself, he will be in contempt.

And, if a man disobey an injunction, he will be in contempt, tho' it was not regularly obtained. 2 *Ca. Ch.* 204.

And, tho' the party would not permit him to have the writ to examine it with the copy served. *Semb.* 2 *Ca. Ch.* 204.

An injunction may be by *parol*, to one present in court. *Vide Pract. Reg. in Chan.* 197.

Or, it shall be in writing. *Ibid.*

[After appearance, an injunction to stay (navigating a ship) cannot be moved but on notice. *Marasco v. Boiton*, *M.* 1750, 2 *Vesey*, 112.]

[The court will not grant an injunction after plea pleaded, till it be argued, but it will order it to come on immediately, and if overruled, plaintiff may move at the same time for injunction. *Humphreys v. Humphreys*, *M.* 1735, 3 *P. W.* 395.]

[Injunction to stay execution, and trial not granted on one motion. *Wright v. Braine*, 3 *Bro. Ch. Ca.* 87.]

[A conditional consent to proceed at law waives an injunction. *Grant v. Priddell*, 1 *Anstr.* 62.]

[On an injunction obtained, the court will not discharge the party out of custody, if taken on legal process. *Willis v. Daniel*, 1 *Anstr.* 36.]

[Where a party is taken after he has obtained an injunction, but before notice given of it, the detaining of him after notice is no contempt. *Ibid.*]

[On a bill for an injunction, a commission shall not be granted to examine a witness in *India*, without a full affidavit of materiality. *Moody v. Steele*, 2 *Anstr.* 386.]

[Acceptor of bill of exchange filed a bill of injunction against the holder, and for want of an answer the injunction was granted; the holder returned the bill to his indorser, who commenced another action against the acceptor. Motion for an injunction against the indorsee refused. *Dawson v. Princeps*, 2 *Anstr.* 521.]

[After an injunction on the original bill dissolved on the coming in of

of the answer, the plaintiff cannot have an injunction on a supplemental bill, tho' supported by affidavits, unless the defendant be in contempt. *Gadd v. Worrall*, 2 *Anstr.* 553.]

[An injunction cannot be extended to protect such as are not parties to the suit in equity. *Ibid.* 555.]

[Where an injunction is granted for want of an answer, and the defendant afterwards demurs, and the demurrer is allowed, the injunction cannot be dissolved without a previous order for that purpose. *Hurst v. Thomas*, 2 *Anstr.* 585.]

[Answer being referred for impertinence is a sufficient cause for continuing an injunction. *Ibid.* 591.]

[After injunction dissolved on the merits, motion to stay trial in ejectment till full answer to the amended bill, refused with costs. *Lady Markham v. Dickenson*, 1 *Ves. jun.* 30.]

(D 9.) *For staying proceedings at common law.* Chancery will by injunctions stay all proceedings at common law. *Vide Pract. Reg. in Chan.* 196.

Sometimes it stays trial; or, after a verdict, it stays judgment; or after judgment, execution; or if execution hath been executed, it will stay the money in the hands of the sheriff. *Vide Pract. Reg. in Chan.* 201, 2.

[After an injunction granted, the court will give leave to defendant to examine plaintiff upon interrogatories, in the common law court, or to proceed to trial, or to affirm judgment. *Simmons v. Mullins*, *M.* 1724, *Bunb.* 182.]

[If an executor, defendant at law, after declaration delivered, files a bill and obtain injunction, plaintiff at law may proceed, and, on *plene administravit* pleaded, take judgment *de bonis testatoris cum acciderint*, and then a *scire facias*, in order to an inquiry of assets. *Morrice v. Hankey*, *M.* 1732, 3 *P. W.* 146.]

[If a bill be brought for relief against a note for marriage-broking, supported by affidavit, the court will restrain the defendant from assigning or indorsing the note, but will not prevent his proceeding at law. *Smith v. Aykewell*, *T.* 1747, 3 *Atkyns*, 566.]

It shall be granted to stop proceedings at common law, if the defendant make any delay; as, if he do not appear on the *subpoena*, but an attachment be awarded, an injunction shall be granted, till answer.

So, if the defendant be beyond the sea or abscond, by which means he cannot be served. *Vide Pract. Reg. in Chan.* 198.

Or, if he pray time to make his answer.

Or, take out a *dedimus potestatem* to take his answer in the country; and the defendant ought to take notice thereof, without service of the injunction. 1 *Ver.* 25. *Vide Pract. Reg. in Chan.* 200.

[If an injunction be dissolved on the merits, or for want of shewing cause, and plaintiff amend his bill, he shall not have another injunction on defendant's having a *dedimus* to take his answer, but he may on the merits. *Anon. P.* 1749, 3 *Atkyns*, 694.]

So, in the *Exchequer*, if there are exceptions to the answer, and a material exception is discovered to the court, upon motion. *Rules and Orders in Exchequer*, 16. *Rule* 41.

[Notice of exception's being filed must be given two days before an injunction will be granted. *Lord Carlisle v. Wyndysell*, in *Sc. T.* 1722, *Bunb.* 116.]

[An

[An injunction shall be dissolved of course, without motion, on over-ruling exceptions. *Walter v. Russell*, in *Sc. M.* 1718, *Bunb.* 30.]

[An injunction shall be continued, if defendant does not sign his answer. *Per cur. P.* 1722, *Bunb.* 251. *Sed quare*, if plaintiff takes a copy?]

[The court (of *Exchequer*) will not grant an injunction, because the defendant has only demurred. *Lamb v. Bowes*, *T.* 1717, in *Sc. Bunb.* 11.]

[Plaintiff cannot have an injunction after plea put in, till the plea is disposed of, and he may move to have it accelerated. *Anon. M.* 1740, 2 *Atkyns*, 113.]

[The court granted an injunction on a *dedimus* to stay proceedings in the bishop's court. *Abthorp v. Jennings*, in *Sc. M.* 1718, *Bunb.* 27.]

[And in the spiritual court at *Richmond*. *Attorney-General v. Starkey*, in *Sc. P.* 1722, *Bunb.* 28.]

[Where there is any thing in the nature of a trust, the court will grant injunction to stay a suit in the ecclesiastical court for a legacy, tho' they have original jurisdiction therein. *Anon. Hil.* 1738, 1 *Atkyns*, 491.]

[If a mean woman of bad character inveigles an infant ward of the court to marry her, and is committed for it; tho' she is afterwards discharged, yet, till she has paid the costs of the contempt, she is under the jurisdiction of the court, and it will restrain her from proceeding in the spiritual court against the infant's guardian for alimony, and against the infant for restitution of conjugal rights and alimony, and will order her to consent to an application to the spiritual court, for the infant and guardian to be absolved from excommunication on these accounts. *Hill v. Turner*, *M.* 1737, 1 *Atkyns*, 515.]

And such an injunction shall not be restrained as to a prosecution of an under-sheriff for a contempt before. 1 *Ver.* 25.

If an injunction be upon a *dedimus*, before declaration, the plaintiff cannot declare, and shall not proceed against bail. *Per King*, 5 *G.* 2. 17.

If after declaration, he may proceed to judgment, and the execution only is stayed. 5 *G.* 2. 17. *Vide* 3 *P. W.* 146. 148.

An injunction till answer, if it be not continued within fourteen days after answer made, and upon a certificate of the register, if there be no motion for the continuance of it upon the merits of the cause, or the insufficiency of the answer, the same term or the first seal afterwards, shall be dissolved, without motion.

An injunction shall be granted for staying proceedings at law, till the hearing of the cause, when the action sued is for an old debt. *Vide Pract. Reg. in Chan.* 198. 202.

Or, the creditor and debtor are dead for a long time past before the action commenced. *Vide Pract. Reg. in Chan.* 198.

[If some bond-creditors proceed at law against the heir at law, and others bring bill in equity for themselves and the other creditors, and obtain decree for sale and satisfaction, injunction will go against those suing at law, if they have not first obtained judgment. *Martin v. Martin*, *H.* 1748, 1 *Vesey*, 211.]

[If a bankrupt, who has acquiesced under commission, brings *trover* against the assignees a year after, the court will grant injunction till hearing. *Flower v. Herbert*, *T.* 1751, 2 *Vesey*, 326.]

[If

[If a jointress permits her son tenant for life in remainder, without waste, to cut timber, and the remainder-man over knows and encourages it, he shall afterwards be enjoined from suing for the treble damages and place wasted against the jointress. *Aston v. Aston*, H. 1749, 1 *Vesey*, 396.]

[If a bill, brought by the principal debtor, to stay proceedings at law, is dismissed, his bail cannot bring another bill, taking up the same equity, unless for collusion to charge the bail at law. *Anon.* T. 1755, 2 *Vesey*, 630.]

[Injunction lies to stay trial in actions by a corporation for petty customs, till answer, where the defence at law may arise out of the answer. *Anon.* T. 1755, 2 *Vesey*, 620.]

So, when the defendant confesses that which shews there was no cause of action, by his answer. *Vide Pract. Reg. in Chan.* 198.]

Or, any record or writing shews it. *Ibid.*

As, if the defendant sues execution upon a statute, contrary to the defeazance.

If he sues a bond, when he was the cause of the non-performance of the condition.

If he sues a bond with a great penalty, where the cause of the forfeiture was small.

If the cause of action accrued by fraud.

If the bond or judgment was obtained by fraud.

If the consideration for the giving of a bond, judgment, &c. was never performed.

[Injunction granted after bond and judgment obtained in C. B., because the money the bond was given for was the consideration of a contract for stock: this was in order not to put the parties to cross actions. *Smith v. Nottingham*, in Sc. P. 1727, *Bunb.* 75.]

[Where the consideration of a bond is the same as the consideration of a parol contract for stock, tho' the parol contract be merged in the bond, yet equity will grant an injunction to stay proceedings at law on the bond. *Awbrey v. Fitzhugh*, in Sc. M. 1721, *Bunb.* 84.]

[It is in general true, that a plaintiff shall not proceed both at law and in equity for the same matter; but the court of equity will oblige him to make his election, in which he will proceed. *Toth.* 52, 3. *Praxis Alm. Introduc.* 12. *Pract. Reg. in Chan.* 145. 1 *Harri-son's Ch. Pract.* 195.]

[But if a person has a mortgage, and also a bond for the same debt, he may bring an action on the bond, and arrest the defendant, pending a suit in equity for a foreclosure. *Burnell v. Martin*, *Doug.* 417.]

If the daughter of the obligee takes part of the money, which the obligor was paying; tho' she was the wife of the obligor, but parted from her husband. 1 *Ch. R.* 68.

So, when the defendant commences an action, after the bill exhibited, for a thing demanded in the bill.

So, if there be a suit depending in the spiritual court for the probate of a codicil, by which the obligation sued is discharged. *R. Hard.* 96.

So, there shall be an order to stay proceedings against a defendant, who is an ambassador in the service of the king beyond sea, for a year and a day, unless he returns sooner. 2 *Ver.* 317.

[The

[The court will continue an injunction in an insurance cause, where a commission to examine is gone to *America*, especially if the case, in its consequences, affects the merchants in general. *Green v. Suasso*, M. 1741, 2 *Atkyns*, 229. *Chitty v. Selwin*, T. 1742, 2 *Atkyns*, 359.]

[If a guardian before passing his accounts bring an action against the infant for his board, the court will continue the injunction till hearing; for the court will have regard to the maintenance allowed, which a jury would not. *Anon. H.* 1747, 3 *Atkyns*, 618.]

But an injunction shall not be granted to stay proceedings at law upon a bare suggestion of the plaintiff by his bill.

[An affidavit verifying the allegations of the bill may be read to obtain injunction. *Bennet v. Loggan*, in Sc. H. 1718, *Bunb.* 35.]

Nor, shall it be granted in the *Exchequer*, but upon motion in court, and good cause. *Rules and Orders in Exchequer*, 16. Rule 41.

[Where there is a bill to establish a modus, injunction may be granted, tho' plaintiff had moved for a prohibition at law, and permitted consultation to go. *Blacket v. Finney*, T. 10 G. *Salmon v. Rake*, T. 1733, *Bunb.* 176.]

It shall not be granted, or dissolved upon a petition. *Ord. per Cla. Rules and Orders of Chancery*, 123. *Vide Pract. Reg. in Chan.* 203.

[Where a bill for an injunction is referred for impertinence before the time for answering is out, the plaintiff shall not, at the expiration of the time, move for an injunction as of course for want of an answer, but shall be in the same situation as if the time for answering were not out; in which case he must move for it on affidavit of circumstances and on notice. 1 *Brown. Ca. Ch.* 574.]

It shall not be granted to stay or remove a suit by *certiorari*, till a bond be given that the bill is sufficient for that purpose, and it shall be proved within 14 days after the writ of injunction delivered. *Vide Pract. Reg. in Chan.* 41.

And if not done, upon certificate of the neglect by the examiner, it shall be dismissed with costs, and a *procedendo* granted. *Vide Pract. Reg. in Chan.* 41, 2. *Vide post.* (2 O 1.)

[The court cannot grant an injunction in criminal prosecutions; but where parties have submitted their right to the court, they may restrain them by order from proceeding on an indictment. *Mayor of York v. Pilkington*, 1742, 2 *Atk.* 302.]

[If *A.* and *B.* give a joint bond to *C.* who dies, leaving *D.* his widow and executrix; *A.* dies, and *D.* is indebted on her own account to *B.* who becomes bankrupt; the court will not grant injunction to stay his assignees from proceeding against *D.* for her separate debt; for there cannot be a set-off in this case. *Bishop v. Church*, M. 1748, 3 *Atkyns*, 691.]

It shall not be granted after verdict usually, without bringing the money recovered into court. *Vide Pract. Reg. in Chan.* 202.

But before verdict, the money is not usually brought into court.

An injunction after a verdict shall be delivered unto the hands of the chancellor himself, with the order upon which it is issued. *Vide Pract. Reg. in Chan.* 197.

If money is brought into court, in order to have an injunction to a suit upon a bond, if it afterwards appears that the greatest part of the bond is paid, the money shall be re-delivered, on security to pay all that is due. *Ch. R.* 1.

It shall not be granted to an ejectment, tho' the lessor had five verdicts against his title in other ejectments. *Eq. R. 2.*

[But tho' an injunction was refused in such a case, on the ground that there was no trust, fraud, or accident to give the court an original jurisdiction, it was afterwards granted on an appeal to the House of Lords. *Proc. in Chan. 261, 262.*]

[Tho' a mortgagee suing for a foreclosure is not thereby precluded from bringing an ejectment at the same time, yet if the account is entangled with an account of the personal estate, and the mortgagor will give security to redeem, the court will grant injunction to stay proceeding on the ejectment. *Booth v. Booth, T. 1742, 2 Atk. 343.*]

[The court will not grant an injunction to stay proceedings at law, till the hearing of a cause on a bill brought by lord of a manor, praying that the tenants may accept of a compensation for houses he has built on the waste; especially if a bill brought by the defendants has been dismissed on a suggestion of plaintiffs, that it was matter for law. *Conyers v. Lord Abergavenny, M. 1738, 1 Atk. 285.*]

[The court will not grant an injunction to stay proceedings in the Admiralty, on a suggestion that an acknowledgment was obtained by duress, and that papers are destroyed. *Anon. T. 1747, 3 Atkyns, 350.*]

[The court will not make an order in the nature of an injunction, to suffer a thing pulled down as a nuisance to be re-erected, till the right is determined, but will only accelerate the determination. *Birch v. Holt, H. 1750, 3 Atkyns, 726.*]

If the plaintiff after an injunction does not proceed for three years, (or, as *Shepherd* says, for three terms,) it shall not be dissolved *ex cursu*.

If it be obtained by misinformation, or abuse of the court, it shall be dismissed with costs.

If an injunction is dissolved on the merits, and leave given to take out execution for a sum awarded due, a bill brought, award pleaded and allowed, another bill brought to stay proceedings on other equity, (connected with the former,) and injunction obtained for want of answer; this injunction shall be discharged, tho' defendants have had much time to answer, for that does not waive the irregularity. *Travers v. E. Stafford, T. 1750, 1 Vesey, 19.*

[Injunction lies not to a *mandamus* of *B. R.*, nor to indictment, information, or prohibition. *Ld. Montague v. Dudman, T. 1751, 2 Vesey, 396.*]

[Where there has been a decree for payment of debts in a suit by trustees under a will; although the parties have not proceeded under it, a creditor shall be restrained by injunction from proceeding at law against the executor, where the personal estate of testator unbequeathed, is not sufficient to pay his debts and funeral expences. *1 Brown. Ca. Ch. 183.*]

[Where a bond is given for the enjoyment of a collateral matter, the court will grant an injunction against an action at law for the penalty, and award an issue of *quantum damnificatus*. *1 Brown. Ca. Ch. 418.*]

[Where there has been a suit for money received, and the defendant files a bill for an injunction, admitting that he has received the money,

money, he shall pay it into court, or the injunction will be dissolved. 1 *Brown. Ch. Ca.* 452.]

[Bill for injunction against proceedings at law : one of the defendants in *England* having answered, an injunction was obtained, till the answers of the other defendants residing abroad should come in, on affidavit of merits. Plaintiff not obliged to bring the money into court, except under special circumstances. *Sholbred v. MacMaster and others*, 2 *Anstr.* 366.]

[On a bill for discovery and injunction, defendant (the plaintiff at law) admitted himself to be merely an agent for the other defendants, and ignorant of the transaction ; the other defendants lived abroad : an injunction was moved for, as of course ; but as there appeared to be danger of losing other material evidence by the delay, it was refused. *Vandam v. Munro*, 2 *Anstr.* 502.]

[Mortgagee got possession of the estate by ejectment, sued at law on the covenant for re-payment, and brought a bill to foreclose : the court held this to be regular, and would not stop the proceedings at law, unless the defendant brought in the money. *Rees v. Parkinson*, 2 *Anstr.* 497.]

[*A.* was guarantee to the owner of an *American* ship, for a merchant who freighted her to *Bordeaux* ; she was detained there by an embargo, and discharged by the freighter. The *French* government having declared themselves bound to indemnify all neutral owners from the effects of the embargo, and the plaintiff (an *English* subject) not being able to take advantage of that order, the court restrained the owner by injunction from proceeding at law against *A.* on his bringing in the money, till the owner had endeavoured to procure an indemnity in *France*. *Cottin v. Blanc*, 2 *Anstr.* 544. See also *Wright v. Nutt*, 3 *Bro. G. C.* 326.]

[Suggestion in a bill against trustees in trust to sell, of their not giving sufficient notice of the sale, verified by affidavit, is not a sufficient ground for an injunction to stop the sale. *Sir John Pechell, Bart. v. Fowler*, 2 *Anstr.* 549.]

[An injunction against proceeding at law extends to restrain an action by the defendant in equity against the sheriff for the money levied by him in the original suit, before the injunction issued. *Bolt v. Stanway*, 2 *Anstr.* 556.]

[But the sheriff, to bring himself within the protection of the order, must comply with the terms of it, by bringing the money into court. *Ibid.* 569.]

[Injunction-cause stood over on coming on to be heard for want of parties : injunction not dissolved, nor receiver appointed on motion without a special case of waste : but plaintiff to speed the cause. *Price v. Williams*, 1 *Ves. jun.* 401.]

[Injunction-bill, charging fraud in obtaining a verdict : affidavits contradicting the answer read in support of the injunction on the merits. *Isaac v. Humpage*, 1 *Ves. jun.* 427. 3 *Bro. G. C.* 463. *S. C.*]

[Where the principal subject in dispute is the locality of the lands of each party, which hath been confused while occupied by one person, a verdict in ejectment, not ascertaining it by metes and bounds, does not decide the dispute ; and therefore a court of equity will not allow the lessor of the plaintiff to take out execution, so as to choose his own part of the lands. *Hardcastle v. Skafte*, 1 *Ves. jun.* 184.]

[Where

[Where the lands are confused, and the plaintiff at law recovers on an instrument, which states the whole to be 25 acres, of which 18 belonged to him, and in fact it appears that the whole land is only 21 acres, he shall not be allowed to take out execution for 18, but must abate proportionably. *Hardcastle v. Shafto*, 1 *Ves. jun.* 184.]

[Defendant distrained, and on replevin made three conusances for rent as bailiff to A., B., and C. Bill for an injunction, stating that the plaintiff held the premises as tenant to A., who had received goods from him, under a stipulation that he might retain the amount out of the rent. It also stated, that A. had since absconded insolvent. The court thought that the other conusances could not be hung up till A. should answer, and refused the injunction. *Nichols v. Philips*, 3 *Anstr.* 636.]

[Injunction obtained for want of an answer, and an answer afterwards filed; plaintiff obtained an order to amend his bill, without notice to the defendant: the bill amended accordingly. Order to dissolve the injunction is of course. *Patton v. Panton*, 3 *Anstr.* 651.]

[On motion for an injunction, the plaintiff cannot read affidavits to contradict the answer. *Somerville v. Buckler*, 3 *Anstr.* 658.]

[Where a bill has been filed for an account, and a creditor comes in before the master, but afterwards brings an action, the court will enjoin. *Hardcastle v. Chettle*, 4 *Bro. C. C.* 163.]

[But where defendant has not applied in the first instance, it shall be without costs. *Ibid.*]

[Motion for an injunction to restrain an action against the auctioneer, for the deposit, refused, where there had been great delay on the part of the vendor. *Lloyd v. Collett*, 4 *Bro. C. C.* 469.]

[Where a man, having a considerable demand against another, fraudulently combines with his debtor to conceal it, in order to induce a third person to consent to a marriage between the debtor and his daughter: the marriage afterwards takes place; he shall be restrained by injunction from proceeding against his original debtor. *Id.* 543.]

(D 10.) *For cause of privilege.*] An injunction shall be granted to stay a suit, when the defendant is privileged to be sued in *Chancery*. *Vide Pract. Reg. in Chan.* 216.

When money was lent to the defendant for a loan to the king. 1 *Ch. R.* 44.

When the plaintiff sues in the *Exchequer* for the same cause, there shall be a rule that he shall make his election in which court he will proceed; if he chooses in the *Exchequer*, the bill in *Chancery* shall be dismissed; if in *Chancery*, an injunction goes to the *Exchequer*. 3 *Ch. Rep.* 2.

(D 11.) *For staying waste.*] By the common law, a prohibition went out of *Chancery* against tenant by the curtesy, in dower, or as guardian, at the prayer of him, who had the inheritance, to inhibit waste, and that before waste committed. 2 *Inst.* 299.

So, now, an injunction shall be granted upon an affidavit of waste committed, to inhibit any waste to be committed by tenant for life, or years. *Vide Pract. Reg. in Chan.* 212, 213.

Or, to inhibit meadow, or other pasture, not ploughed within twenty

twenty years being ploughed. 1 *Ch. R.* 14. *Ch. R.* 189. *Vide Pract. Reg. in Chan.* 212.

So, to inhibit ancient inclosures being thrown down. *Vide Pract. Reg. in Chan.* 212.

Or, houses being pulled down. 2 *Ca. Ch.* 32. *Vide Pract. Reg. in Chan.* 212.

And it shall be granted also against tenant after possibility, &c. if he pulls down the seat, &c. 2 *Ca. Ch.* 32.

Or, against him, who in respect of a trust, &c. is not liable to an action of waste. *Ibid.*

[If lands are limited to *A.* for life, to trustees to preserve, &c. to first, &c. sons of *A.* in tail, remainder to *B.* for life, to his first, &c. sons in tail, reversion in fee to *A.*, the court will grant injunction, and continue it till hearing to stay *A.* cutting timber at the suit of *B.*, tho' he has not the immediate remainder, or at the suit of the trustees to preserve, &c. *Perrot v. Perrot*, T. 1744, 3 *Atkyns*, 94.]

[If a father devises lands to his son and his heirs, but if he dies before twenty-one without issue, to his daughters, and directs in that case the lands to be sold, and the money divided among them; the court will grant injunction to prevent cutting timber till the son is of age; for till of age, he shall be considered as trustee of the inheritance for the benefit of the daughters. *Robinson v. Litton*, M. 1744, 3 *Atkyns*, 209.]

[The court will grant injunction to restrain tenant for life, without impeachment of waste, from cutting down trees in lines or avenues, or ridings in a park, whether planted or growing naturally, or trees not of a proper growth to be cut. *Packington's Case*, P. 1745, 3 *Atkyns*, 215. See also 2 *Vern.* 738. 1 *Term Rep.* 56.]

[So, also, to restrain him from defacing the mansion-house; and not only so, but will oblige him to put it in the same plight in which he found it. *Prec. Ch.* 454.]

[So, a widow tenant for life by a will, with permission by a codicil to cut timber during her widowhood at seasonable times, shall be restrained, by injunction, from cutting ornamental or immature timber. 1 *Brown. Ca. Ch.* 166.]

[So, if lands be devised to be sold, and other lands to be purchased, in which *A.* shall be tenant for life without impeachment of waste; the rents and profits of the estates to be sold, to be to the use of the persons who would be entitled to those of the estates to be purchased: the tenant for life cannot cut down timber on the land to be sold. 1 *Brown. Ca. Ch.* 159.]

[The court will grant injunction to stay waste, at the suit of the ground-landlord against an under-lessee, who holds by lease from the original lessee. *Farrant v. Lovel*, H. 1750, 3 *Atkyns*, 723.]

[Or, against tenant for life, at the suit of remainder-man in fee, tho' there is an intermediate remainder. *Ibid.*]

[Or, against mortgagee in fee in possession, for cutting timber, if he does not apply the money in sinking principal and interest. So, against a mortgagee for years. *Ibid.*]

[If tenant for life, without impeachment of waste, has cut timber, so as not to leave sufficient for repairs, the court will restrain him from cutting any more without leave of the court. *Aston v. Aston*, T. 1749, 1 *Vesey*, 264.] [The

[The court will grant an injunction on a forcible entry, against commissioners of turnpike digging gravel in land leased for 21 years, and turned into a garden, whereof plaintiff has been three years in possession. *Hughes v. Morden's College*, M. 1748, 1 *Vesey*, 188.]

[To restrain rector from cutting timber in the church-yard till hearing, except for repairing parsonage-house, out-houses, chancel or pews. *Starchy v. Francis*, M. 1741, 2 *Atkyns*, 217.]

But it shall not be granted against him who has the inheritance, unless he be only a trustee, or in such-like special case. *Vide Pract. Reg. in Chan.* 212.

Nor, against him who has an estate dispunishable of waste. *Ibid.*—*Cont.* if he pulls down the ancient and capital house, &c. *Per Chancellor*, 2 *Ca. Ch.* 32. 1 *Sal.* 161. 1 *Ch. R. E. of Oxford*, 10. *Vide* 1 *Ver.* 23.

Nor, against a lessee who had agreed to pay 20s. an acre *per ann.* increase of rent, if he ploughed a meadow. 2 *Ver.* 119.

[Nor, is the conversion by the governors of a charity of meadow land into buildings in the nature of waste, unless clearly injurious. 2 *Ves. jun.* 42.]

Yet, if a lessee without impeachment of waste, about the end of his term, intends to cut down all the trees, &c. an injunction shall go; for that is contrary to the public good. *R.* 1 *Rol.* 380. l. 5.

But nobody can sue in equity against a lessee without impeachment of waste, for damages for pulling down houses, or cutting down trees. 1 *Rol.* 379. *T.*

Altho' he avers that there was an agreement that the party should not commit voluntary waste; for there cannot be an averment contrary to a deed. *R.* 1 *Rol.* 379. l. 40.

[Nor, can a tenant for life, liable to waste, having sold timber, prevent the vendee from cutting it. 3 *Ves. jun.* 3.]

[In a special case on a particular right, the court will not grant injunction before answer. *Attorney-General v. Doughty*, T. 1752, 2 *Ves.* 453.]

[An answer being insufficient, is not ground to continue injunction; it must be excepted to; and if reported insufficient, it may revive. *Morris v. Ld. Berkeley*, T. 1752, 2 *Vesey*, 452.]

[The court will not grant an injunction to stay digging mines where defendant claims the inheritance, till the answer is come in, or defendant in default; but if he has only a term for years, or life, and the reversion is in plaintiff, will grant it before answer. *Lowther v. Stamper*, P. 1747, 3 *Atkyns*, 496.]

[On motion to stay waste, a particular title must be shewn. 1 *Brown. Ca. Ch.* 57.]

[Injunction from farther digging a ditch; but the court will not order it to be filled up till after answer. *Anon.* 1 *Ves. jun.* 40.]

[The court will not interfere by injunction, in the nature of an order to stay waste to prevent a mere breach of contract. *Longman v. Culliford*, 3 *Anstr.* 645.]

[Nor, to prevent tenant's carrying away straw and dung, and ploughing up lands contrary to the covenants of the lease. *Johnson v. Goldswayne*, 3 *Anstr.* 749. *Sed vide Geast v. Ld. Belfast*, *ibid.* in notis.]

[Injunction granted to prevent the negotiating of a note given for money

money won at play, on affidavit before service of the *subpœna*. — *v. Blackwood*, 3 *Anstr.* 851.]

[Where an injunction is obtained in the absence of one of the defendants abroad; on a motion to discharge that order, the answer of the other defendant cannot be read. *St. John v. Cargill*, 3 *Anstr.* 933.]

[Injunction, that the validity of a patent might be tried at law: verdict for the patentee, subject to the opinion of the court on a case; the court were equally divided. The Lord Chancellor held, that the patentee should bring another action, but refused to impose any terms on him, or to dissolve the injunction in the mean time. *Bolton v. Bull*, 3 *Ves. jun.* 140.]

[Injunction against proceeding at law, securities obtained by one *French* emigrant against another, by arresting him when about to sail on the expedition against *France*; and under an obligation entered into in *France*, as surety, which, according to the laws of that country, could not affect the person. *Talleyrand v. Boulanger*, 3 *Ves. jun.* 447.]

[When there is a bill filed against an executor, and decree *quod computet*, and that creditors shall come in; if a creditor brings an action, an injunction shall issue to stay trial as well as execution; but if the action be brought before the bill filed, and he chooses to discontinue, he shall be allowed to prove his costs at law, in addition to his debt. *Goate v. Fryer*, 3 *Bro. Ch. Caf.* 23.]

[Action at law on a bond given to a trustee, reciting that the obligor was, on the resignation of obligee (*cestuy que trust*), appointed to an office, not restrained by injunction; the question. Whether the consideration was corrupt or not? being triable at law. *Thrale v. Relf*, 3 *Bro. C. C.* 57.]

[Injunction against purchaser on behalf of creditor, to restrain payment to the heir. *Green v. Lewes*, 3 *Bro. C. C.* 217.]

[Injunction to restrain defendants from negotiating a bill of exchange given for goods not delivered, issued on certificate of bill filed, and to be served with the *subpœna*. *Patrick v. Harrison*, 3 *Bro. C. C.* 476.]

[Injunction to stay waste refused, where the plaintiff and the defendant in possession were tenants in common; but granted on affidavit of the defendant's insolvency. *Smallman v. Onions*, 3 *Bro. C. C.* 621.]

[(D 12.) *For restraining other acts*.—If a sole right to a ferry appears by record, the court will grant injunction before answer, to restrain others from using ferry-boats there; but there must be full affidavits that plaintiffs keep up sufficient ferry-boats, otherwise not. *Anon. T.* 1750, 1 *Vesey*, 476.]

[The court will grant injunction to stop a building in *London*, which obstructs lights, till the right is tried at law, and order the scaffolds and boards to be pulled down. *Ryder v. Bentham*, *T.* 1750, 1 *Vesey*, 543.]

[Injunction to stay building must be on stopping ancient lights, for which there is prescription, or on agreement. *Morris v. Ld. Berkeley*, *T.* 1752, 2 *Vesey*, 452.]

[If a nuisance is pulled down, the court will not give leave to re-erect, and quiet the possession till the hearing. *Holt's Case*, *H.* 1750, 2 *Vesey*, 193.]

[If a defendant admits he has done waste, before filing the bill, tho' he swears he has done none since, the court will not dissolve the injunction. *Anon. P. 1747, 3 Atkyns, 485.*]

[An injunction may be granted to restrain defendants in an information by attorney-general at the relation, &c. from misapplying money, on their paying a *dedimus* to answer. *Attorney-General v. Norris, M. 1728, Bunb. 258.*]

[To restrain defendant from receiving S. S. annuities, on attachment for want of answer. *Terry v. Harrison, M. 1730, Bunb. 289.*]

[The court will not grant an injunction to restrain a person from committing a common trespass; but if it continues so long as to become a nuisance, it will. *Coulson v. White, H. 1743, 3 Atkyns, 21.*]

[The court grants injunction to restrain such nuisances only as are so at law, not such as fear (tho' reasonable) deems such; as, an inoculating hospital. *Anon. M. 1752, 3 Atkyns, 750.*]

[The court will not grant injunction to stay the use of a market, for there are remedies at law by *scire facias*, or action. And 2. after the right established at law. *Anon. M. 1752, 2 Vesey, 414.*]

[Where defendant had a piece of water supplied by the same stream from which a mill was supplied, and sometimes kept back the water, and at other times let it in in such quantities that the mill was overflowed, an injunction was granted to restrain him from preventing it flowing in regular quantities. *1 Brown. Ca. Ch. 574.*]

(D 13.) *For quieting possession.*] An injunction shall be granted for quieting the possession, if the plaintiff be ousted of his possession, which he had at the time of the bill exhibited, and for three years before. *1 Ver. 156. Vide Pract. Reg. in Chan. 214.*

And it hath been usual to insert, that he was in possession at the time of the bill, and for several years before, and that his interest was not determined, and to give bond in ten pounds for the truth of it.

But it shall not be granted, except it be of an house or land.

Not for rents received, &c.

Neither shall it be granted before the hearing of the cause, without an *affidavit*, that he was in possession at the time of the bill, and for three years before. *Vide Pract. Reg. in Chan. 214.*

[If a bill be filed for quieting plaintiff's possession, on affidavit of disturbance, an injunction may go, before a *subpæna* to answer is served. *Pearce v Penrose, T. 1722, Bunb. 110.*]

And it shall not extend to a possession which he claims from others.

Nor, shall it be granted upon the motion of a defendant, but only for him who has a bill in court, and was in possession for three years before, or after a determination of the cause for him upon a hearing of the merits. *1 Ver. 156.*

Nor, will it prevent the defendant from proceeding at law, from making of leases, distraining for rent, &c. *Vide Pract. Reg. in Chan. 215.*

And if the plaintiff delays his suit, it shall be dissolved. *Ibid.*

[A perpetual injunction was decreed after two trials at bar in favour of plaintiff. *N. B.* This practice was introduced, that the right might be quieted in ejectments, (where at law the party is always at liberty

liberty to bring a new one,) as it was in real actions, where the verdict was final. *Leighton v. Leighton*, M. 7 G. Str. 404.]

[A perpetual injunction was granted after five ejectments, three nonsuits, and two verdicts, and two bills in equity dismissed. *Barefoot v. Fry*, H. 1723, Bunb. 158.]

[If there have been suits in this court relating to a will of personal and real estate, and all parties have admitted the will and probate, and decrees thereupon made, this court will grant perpetual injunction to stay proceedings in the prerogative court, for controverting the will by a party to the suit in this court. *Sheffield v. Dukes of Buckinghamshire*, M. 1739, 1 Atkyns, 628.]

[Tho' the court will decree specific performance of agreement, to settle boundaries of lands in *America*, yet it will not decree quiet enjoyment of them, which would occasion continual applications to this court for contempts, &c.; and this ought to be to the proper jurisdiction. *Penn v. Ld. Baltimore*, P. 1750, 1 Vesey, 444.]

(D 14.) *For staying printing, &c.*] An injunction shall be granted to inhibit the defendant from printing books of common law, the sole privilege of which by patent is granted to the plaintiff, if the defendant be in contempt for not answering. 2 Ca. Ch. 67. 76. 93. *Vide Trade (B)*.

[An injunction may be continued after the answer come in, on affidavits of the prejudice that would accrue on dissolving it. *Gibbs v. Cole*, P. 1734, 3 P. W. 255.]

But an injunction to inhibit a ship trading to the *East Indies* was denied, tho' the owners were in contempt for not answering a bill by the *East India Company*, who have by patent the sole trade there. 2 Ca. Ch. 165. Denied till the validity of the patent was tried. 1 Ver. 127.

So, if the right be not settled, the court will not grant an injunction to the printing, before a trial. 1 Ver. 120. 275, 6.

An injunction was granted to inhibit the probate of a will for the personal estate, after a verdict, which had found it no will. R. Ca. Ch. 80.

[The *st. 8 G. 2. c. 13.* for encouragement of engraving, &c. is not confined to works of invention or history, but extends to any new print; as, a print of a building, prints of plants represented in a different manner than hitherto. *Blackwell v. Harper*, M. 1740, 2 Atkyns, 93.]

[After an injunction dissolved on the merits, the plaintiff, on an amended bill, cannot have another injunction, without a special affidavit, though the defendant be in contempt for not answering. *Lingham v. Toule*, 1 Anstr. 188.]

[A commission to examine witnesses in *India*, not having been returned in two years, the court dissolved the injunction. *Penney v. Edgar*, 1 Anstr. 276.]

[On exceptions overruled, plaintiff cannot move to dissolve the injunction, unless he has obtained a previous order *nisi* for that purpose. — *v. Dubarry*, 1 Anstr. 255. In Chancery it is otherwise. *Ibid.*

[Books colourably shortened, and where quotations are translated, are within the 8 Ann. c. 19. but fair abridgments are not; for the invention,

invention, learning, and judgment of the author are shewn in them. *Gyles v. Wilcox*, H. 1740, 2 *Atkyns*, 141, *Bell v. Walker*, 1 *Brown*, Ca. Ch. 451.]

[The court will grant an injunction for a collection of familiar letters, as well as other books. There is a distinction between letters wrote by a person, and wrote to him. *Pope v. Curl*, T. 1741, 2 *Atkyns*, 342.]

[So, tho' the book has been pirated and printed in Ireland, and pretended to be only re-printed here. *Ibid.*]

[The court will not grant injunction to restrain one tradesman from using another's mark (as a card-maker from using the *Mogul* stamp). *Blanchard v. Hill*, M. 1742, 2 *Atkyns*, 484.]

(E) Bill in Chancery.

(E 1.) When it shall be filed.

IF the defendant appears at the return of the process, (or before noon, or the rising of the court upon the day after costs day, or when the process is returnable the last return in term, upon the first return in the next term,) and the bill be not then filed, the defendant after entering his appearance, upon the day after the return, (if the *subpœna* be returnable at a certain day, if at the common day of return, then upon the day after the *quarto die post*,) by his attorney shall give a rule for costs. And now by the *st. 4 & 5 Ann.* 16. bills shall be filed before any *subpœna*, unless it be to stay waste or a suit at law.

And if the bill be not filed before noon of the next day, the defendant shall be discharged with costs to be taxed by a master. *Vide Pract. Reg. in Chan.* 26, 27.

It ought to be filed with the six clerk; and before that, it is not of record. *Ord. per Cla. Rules and Orders of Chancery*, 94. *Vide Pract. Reg. in Chan.* 28.

It shall be dated upon the day when it comes into the office. *Ord. per Cla. Rules and Orders of Chancery*, 93. *Vide Pract. Reg. in Chan.* 27.

So, by order in the *Exchequer*; and it shall be signed by the attorney. *Vide Rules and Orders in Exchequer*, 2. Rule 3.

No six clerk shall antedate any bill. *Ord. per Cla. Rules and Orders of Chancery*, 94. *Vide Pract. Reg. in Chan.* 27.

Nor, shall any under-clerk keep it, without delivering it to the six clerk, or his deputy in his absence, to be filed. *Ord. per Cla. Rules and Orders in Chancery*, 94. *Vide Pract. Reg. in Chan.* 27.

Nor, shall make any copy of the bill, or other pleading, till it be filed. *Ord. per Cla. Rules and Orders of Chancery*, 104. *Vide Pract. Reg. in Chan.* 28.

If there be a *certiorari* bill against the plaintiff in an inferior court, because the witnesses are out of the jurisdiction, and for other matters, a *procedendo* shall not go; for the plaintiff in the inferior court might have filed his bill in this. *R. Ca. Ch.* 31.

No bill shall be received, unless under the hand of counsel. *Ord. per Cla. Vide Pract. Reg. in Chan.* 25.

If his hand be counterfeited, the bill shall be dismissed. *Vide Pract. Reg. in Chan.* 25. Counsel

Counsel shall not sign any bill, unless it be written or perused by him, before the engrossment; and for his security, he will do well if he signs the paper-draught. *Ord. per Cla. Rules and Orders of Chancery*, 93. *Vide Pract. Reg. in Chan.* 25.

In the *Exchequer* no bill shall be accepted, unless signed by the plaintiff's attorney, and allowed by a baron, except upon a suit by the attorney-general. *Vide Rules and Orders in the Exchequer*, 2. *Rule 3.*

No bill founded upon the loss of a deed or writing, &c. shall be received in *Chancery*, without an *affidavit* that the deed, &c. is lost; for this loss entitles the court to jurisdiction; for otherwise the plaintiff might have a remedy at law. *R. Ca. Ch.* 231. *viz.* when the plaintiff prays not only a discovery, but also relief upon the deed. *R. Ca. Ch.* 11. But if he does not pray relief, an *affidavit* is not necessary. 1 *Ver.* 180. 247. 310. *Vid.* 3 *Atk.* 17. [2 *Ves. jun.* 461.]

And there is no need of an *affidavit*, where the loss of the deed is not that which entitles the court to jurisdiction. *Ca. Ch.* 231. 2 *Mod.* 173.

Nor, when the plaintiff only prays the discovery of a deed, or the producing it at a trial. *R. Ca. Ch.* 11. 2 *Mod.* 173.

(E 2.) The Matter of the Bill.

*Quis, quid, coram quo, quo jure petatur, et a quo
Recte compositus quisque libellus habet.*

(E 2.) *Must have proper parties, &c.*] If all proper persons are not made parties to the bill, any other shall be added upon motion. *Vide Pract. Reg. in Chan.* 29. 263. [*Vide post.* (2 X 6.)]

The king may sue there for equity; or, the chancellor himself; but he shall not make a decree in his own cause. *R. 1. Rol.* 373. *L.*

All concerned in the demand ought to be made parties; and therefore, if there be a bill against the executor of one obligor for discovery of assets, all the obligors shall be joined; for the charge ought to be equal. 2 *Vent.* 348.

[But in a bill against an executor, either by the creditors or legatees, it is not necessary to make the residuary legatee a party. 1 *Brown. Ch. Rep.* 303.]

[An objection for want of parties, ought regularly to be made on opening the proceedings, and before the merits are disclosed; but it frequently happens, that after a cause is gone into, and even thoroughly heard, yet the court is compelled to let it stand over, for want of parties. 3 *Atkyns*, 111.]

[If a debt is joint and several, each of the debtors must be brought before the court, because they are entitled to each other's assistance in taking the account, and likewise to contribution; so on specialty, heir and executor both must be parties. *Madox v. Jackson*, *H.* 1746, 3 *Atkyns*, 406.]

[But if there are principal and sureties, the principal cannot object that the sureties are not parties. *Ibid.*]

[And if bill is brought against principal and one surety, and it is admitted the other is dead insolvent, and no part of the debt paid, his representatives need not be parties. *Ibid.*]

[On

[On an information by attorney-general, at the relation, &c. proceedings shall not be stopt, because it is brought without the privity of one of the relators; but he may have his name struck out. *Attorney-General v. Norris*, M. 1728, *Bunb.* 258.]

[The attorney-general need not be a party to a suit relating to a private charity, such as a voluntary society to provide for the members and their widows, by weekly contribution. *Anon. T.* 1745, 3 *Atkyns*, 277.]

If the suit be by one surety against another, for contribution, supposing that *A.*, another surety, is dead insolvent, the executor of *A.* ought to be a party. *R. Ch. Rep.* 15.

[In a bill by the surety for an accountant of the excise to be relieved against a *scire facias* on his bond, the commissioners of excise must be parties. *Makepeace v. Needler and the Attorney-General*, M. 1730, *Bunb.* 291.]

[If there are two lessees, and one brings bill for apportionment of rent, the other lessee must join as plaintiff, or be made defendant, or the bill will be dismissed with costs. *Stafford v. City of London*, *Str.* 95.]

If the suit be by order of the vestry, all of the vestry shall be parties. *Hard.* 333.

If there be a covenant by a patentee to pay a rent to *B.*, and the right of *B.* to the payment be dubious, in a bill by *B.* the attorney-general ought to be a party. *Hard.* 181.

Otherwise, if the covenant be in affirmance of a prior right of *B. R.* *Hard.* 181.

If the suit be for a lunatic, the committees, as well as the lunatic, shall be parties. *R. Ca. Ch.* 19.

If the suit be by the assignee of a legacy, the executor ought to be a party; and it is not sufficient to say, that he consented, *R. Ca. Ch.* 277.

So, generally, a lunatic, as well as the committees, shall be a party. *Ca. Ch.* 113. *in marg.* Where the suit is for his benefit; as, to enforce an agreement made when he was *compos.* *R. Ca. Ch.* 153.

Or, the attorney-general. *Ch. R.* 135.

Otherwise, if it be to avoid an act done by himself; for he cannot disab himself. *Semb. Ca. Ch.* 113, 153.

So, an idiot need not be made a party. *Ca. Ch.* 153.

If the bill be for an account against a trustee, all the *cestuy que trusts* ought to be plaintiffs. *R. upon a Plea*, 1 *Ver.* 110.

[If it appears by the answer that the *cestuy que trust* is not made a party, the bill shall be dismissed. *Whistler v. Webb*, in *Sc. M.* 1719, *Bunb.* 53.]

[The owner of the inheritance must be made party to a bill to establish a custom. *Spendler v. Potter*, M. 1724, *Bunb.* 181.]

[In a bill for tythes by lay impropiator, a person entitled to a portion of tythes of part of the lands, or who has a grant from the crown of part of the lands and the tythes thereof, prior to the grant of the rectory, must be party; even tho' he is before the court as party in a cross-bill, praying exemption as to other lands. *Hcooper v. Lethbridge*, M. 1730, *Bunb.* 291.]

[If an engineer be employed by commissioners under an act of parliament to conduct a navigation, a bill filed against these commissioners

ers who have signed any of the orders, is sufficient, the others need not be made parties. 1 *Brown. Ch. Rep.* 101.]

[So, if a tradesman be employed by the committee of a voluntary society, a bill against the committee is sufficient without making the other members parties. *Id. ibid.*]

If it be for relief against an assignment of a bail-bond by the sheriff, the plaintiff in the action ought to be a party. 1 *Ver.* 87.

But if a man articles for the purchase of land in his own name, and as for himself, tho' it was in trust for another, in a bill for performance of the articles, the *cestuy que trust* need not be a party. *Per Cowper, H. 4 Anne, between Bateman and Woodcock.*

[If an ancestor has agreed for purchase of particular lands, and dies before it is completed, and heir at law brings bill against devisees who claim under ancestor's will made before the purchase; the vendor must be a party if his title is doubtful, otherwise if it is clear. *Green v. Smith, M.* 1738, 1 *Atkyns*, 572.]

[A mortgagee who has assigned without the mortgagor's joining, need not be made a party in a suit to redeem. *Hill v. Adams, P.* 1740, 2 *Atkyns*, 39.]

[Where there are three mortgagees, joint-tenants, one cannot bring a bill to foreclose, without making the others parties. 1 *Brown. Ch. Rep.* 368.]

[Where the second mortgagee brings a bill to redeem against the first mortgagee, the mortgagor or his heir must be a party; and if the mortgagor be dead, and his heir abroad, the court cannot proceed. 2 *Brown. Ch. Rep.* 276.]

[If a mortgagee who has a plain redeemable interest, makes several conveyances in trust to entangle affairs, it is not necessary to make all the persons who have an interest parties. *Yates v. Hambly, M.* 1741, 2 *Atkyns*, 237.]

[But where the redemption depends on equitable circumstances, and the mortgagee in fee has made an actual conveyance, with limitations and remainders over, the first tenant in tail must be a party. *Ibid.*]

[The heir at law need not be made a party to a bill brought by a devisee to redeem a mortgage, unless he claims to have the will established. *Lewis v. Nangle, T.* 1752, 2 *Ves.* 431.]

[To a bill for execution of a trust, by settling an estate on the several branches of a family, it is necessary to make the first entitled to the inheritance a party, if in being. *Finch v. Finch, M.* 1752, 2 *Ves.* 491.]

[If tenant in tail brings bill against tenant for life and trustees, to oblige them to make settlement pursuant to a will, and it appears that plaintiff has covenanted to grant annuities out of such lands as shall come to him after his father's death, these annuitants must be parties. *Pinsent v. Pinsent, M.* 21 G. 2. 1 *Wils.* 179. 3 *Atkyns*, 571.]

[The tenants of two manors granted in tail in recompence of services, reversion to the crown, need not be made parties to a suit to settle the boundaries; so neither the planters, to a suit to settle the boundaries between two provinces in America. *Penn v. Ld. Baltimore, P.* 1750, 1 *Ves.* 444.]

[If plaintiff at hearing waives the relief, he prays against a particular

lar person, that person's not being a party is of no weight. *Pawlet v. Bishop of Lincoln*, P. 1742, 2 *Atkyns*, 296.]

[On a bill for an account of fees to establish a right, all persons who have any pretence to a right, must be before the court, for all will be bound by a decree; tho' at law a judgment for fees does not bind a third person. *Ibid.*]

[If you draw the jurisdiction out of a court of law, you must have all parties before the court who are necessary to make the determination complete, and to quiet the possession; therefore if lessee brings a bill to have an obstruction to his way removed, and to be quieted in possession, the lessor, owner of the inheritance, must be before the court. *Poore v. Clark*, H. 1742, 2 *Atkyns*, 515.]

[If *A.* is appointed executor till *B.* comes of age, who is then to be executor, *A.* must be made a party to a bill brought after *B.* is of age, for a demand on the whole estate of testator, unless *B.* has received the whole from *B.* on an account stated. *Glass v. Oxenham*, H. 1740, 2 *Atkyns*, 121.]

[A person who acts ministerially only, cannot be the sole defendant (as, the treasurer of the commissioners for building the 50 churches, but rather the commissioners only). *Vernon v. Blackerby*, H. 1740, 2 *Atkyns*, 144.]

[The representatives of the undertakers for briefs, who are dead, need not be brought before the court; for they are each answerable, the one for the other, and are to be considered as one body. *Ex parte Angel*, P. 1741, 2 *Atkyns*, 162.]

[Where the whole equitable interest is assigned over, it is not necessary in every case to make a person who has the legal interest a party. *Brace v. Harrington*, M. 1741, 2 *Atkyns*, 235.]

[But if an obligee assigns a bond, and the assignee after twenty-two years silence brings a bill, the representative of the obligee should be a party. *Ibid.*]

If the bill be for a term or personal duty against an executor in trust, the *cestui que trust*, or the residuary legatee, need not be a party. 1 *Ver.* 261.

[A bond-creditor may bring a bill against an executor for discovery of assets, and for satisfaction, without making all other bond or superior creditors parties; for the court only decrees an account, and the executor may set forth the debts. *Anon.* M. 1747, 3 *Atkyns*, 572.]

[It is not necessary to make creditors parties to a suit for a legacy; the executor is sufficient. *Peacock v. Monk*, M. 1748, 1 *Vesey*, 127.]

[If bill is brought by a pawnee for an account and delivery of jewels, the pawner need not be a party. *Saville v. Tankred*, T. 1748, 1 *Vesey*, 101.]

[If husband, tenant for life, remainder to his wife for life, brings bill to know if certain lands are included in the settlement, the wife must be party. *Herring v. Yoe*, H. 1737, 1 *Atkyns*, 290.]

Or, by an heir, for discovery of the money of *A.* with which a trustee purchased an estate, the executor of *A.* need not be a party. R. Ch. R. 4, 5.

[If creditors bring bill to compel the sale of lands devised to pay debts, the heir should be a party; but if the lands have been long enjoyed under the will, a sale may be decreed, tho' he is not. *Harris v. Ingledew*, H. 1730, 3 *P. W.* 91.] [If

[If the trust to pay debts is created by deed, the heir need not be a party unless he is to have the surplus. *Harris v. Ingledew*, H. 1730, 3 P. W. 91.]

[Where a trustee has assigned his trust, in a bill by *cestuy que trust*, against the trustee, the assignee must be a party, as the decree should be first against him, and the trustee to stand as a security. 2 *Brown. Ch. R.* 225.]

[Where money is given by will to be applied to a charity, but for some reason cannot be applied to that charity, and an information is brought to apply it to some other charity analogous to that mentioned in the will, and if there be a residuary gift to trustees for other charitable uses; the trustees and the heir, tho' he be disinherited, must be parties. 2 *Brown. Ch. Rep.* 495.]

[The heir at law must be made a party to a bill by creditors on the statute of fraudulent devises. 3 *W. & M. c.* 13. *Warren v. Stawell*, H. 1740, 2 *Atkyns*, 125.]

[In a bill for account of personal estate, it is not sufficient that the person who has a right to administer is a party; he must have taken out administration. *Humphreys v. Humphreys*, H. 1734, 3 P. W. 349. *Contra* in *Cleland v. Cleland*, *Pr. in Chan.* 64.]

[If plaintiff after bill filed takes out administration, it may be charged by way of amendment, as well as by way of supplement. *Ibid.*]

[If personal estate is given to a bastard, and executors are made to take care of the child and do it justice, and it dies intestate without wife or issue; the executors may sue for the testator's personal estate, without making the attorney-general, or the administrator of the bastard, parties. *Jones v. Goodchild*, H. 1729, 3 P. W. 32.]

[To a bill against an executor, a debtor of the testator must not be made a party. *Utterton v. Main*, 2 *Ves. jun.* 95.]

[Uncertificated bankrupt filed a bill, the assignees not being parties: on circumstances which raised a doubt of the validity of the commission, the bill was retained, with liberty to add parties, plaintiff paying the costs of the day. *Govet v. Armitage*, 2 *Anstr.* 412.]

[Timber purchased for a colliery; before it was applied to the use of the colliery, some of the owners retired; and it was paid for by those only who remained: the former owners held not to be necessary parties to a suit by such as remained against the vendor, on account of that sale. *Maffey v. Davies*, 2 *Ves. jun.* 317.]

[Where different booksellers procure copies of a spurious edition for sale, the proprietor of the copyright must file separate bills against each. *Dilly v. Doig*, 2 *Ves. jun.* 486.]

[There must be separate bills on distinct invasions of a patent; otherwise, of a right of fishery, or the custom of a mill. *Ibid.* 487.]

[In a suit against assignees, the bankrupt may be examined as a witness; and therefore ought not to be joined as a party. *Griffin v. Archer*, 2 *Anstr.* 478.]

[Bill on 9 *Ann.* against the winner of more than 10*l.* at play must state the plaintiff to be the loser, or that three months have elapsed since the offence. *Hudson v. Davis*, 2 *Anstr.* 504.]

[The plaintiff's equity must appear in the stating part of the bill. *Flint v. Field*, 2 *Anstr.* 543.]

[One of two joint executors, and residuary legatees, assigned his interest,

interest, and died. The assignee filed a bill to have half the residue transferred to him : the representative of the assignor need not be a party, unless there appear any doubt of the validity of the assignment. *Blake v. Jones*, 3 *Anstr.* 651.]

[On a devise to sell, and the produce to be divided, all persons interested in the fund must be parties to a bill for a share of such produce, altho' the land were sold before the suit. *Faithful v. Hunt*, 3 *Anstr.* 751.]

[On a bill by devisees in trust to sell for specific performance of an agreement to purchase, after the report in favour of the titles, objection that the persons entitled to the purchase money, subject to debts, legacies, and other charges, were not parties to the suit, comes too late. *Wakeman v. the Dukes of Rutland*, 3 *Ves. jun.* 233.]

[An insolvent debtor is not a necessary party to a bill by a purchaser of his interest in stock against his assignee. *Collet v. Wollaston*, at the Rolls, 3 *Bro. Ch. Ca.* 228.]

[Bill as to a moiety of a residue ; the other moiety was given to A. (one of the defendants) for life ; and on her decease, to such persons as she should appoint ; and in default of appointment, to certain other persons. Those other persons must be parties. *Sherit v. Birch*, at the Rolls, 3 *Bro. Ch. Ca.* 229.]

[Bill by some of the residuary devisees on behalf of themselves and the other devisees : held that all the devisees must be parties. *Parsons v. Neville*, 3 *Bro. Ch. Ca.* 365.]

[Creditors of A. cannot maintain a bill against the representatives of B., to a part of the residue of whose estate A. is entitled. *Elmslie v. McAulay*, 3 *Bro. Ch. Ca.* 624.]

[Bill for an account, where a legacy was left to a charity, without making the attorney-general a party. *Chitty v. Parker*, 4 *Bro. Ch. Ca.* 38.]

Counsel shall take care that the bill be brief and succinct, reciting only the material part of writings, without transcribing them *in hac verba*, or using unnecessary traverses, prolix impertinence, or multiplicity of words. *Ord. per Cla. Rules and Orders of Chancery*, 93.

The suggestion, that the plaintiff has no remedy at law, is usually inserted, but not necessary.

[If a bill is brought for an account of fees, &c. and to establish a right, it is not enough to say the right vested in plaintiff ; he must shew how. *Lord Digby v. Meech*, P. 1725, *Bunb.* 195.]

If a bill be in the disjunctive ; as, that A. was seised for life, or in tail, &c. ; the defendant may take it either way, and a bar to the estate-tail is good. 1 *Ver.* 219.

If the bill contains matter criminal or scandalous, it shall be expunged upon a reference to a master, and the counsel shall pay costs to the party grieved, before he shall be heard in court. *Ord. per Cla. Rules and Orders of Chancery*, 93, 4. *Vide Pract. Reg. in Chan.* 25.

But if the master report the bill not scandalous, he who procured the reference shall pay costs. *Ord. per Cla. Rules and Orders in Chancery*, 94. *Vide Pract. Reg. in Chan.* 25.

[If a bill is scandalous, it is also impertinent ; but it may be impertinent without being scandalous : and nothing relevant is either ; otherwise, charges of fraud would be scandalous. *Fenboulet v. Passavant*, T. 1750, 2 *Vesey*, 24.]

[None shall be made a defendant merely to pray costs against him ;

as,

as, if *A.* purchases a sailor's prize money, and assigns to *B.*, and the sale is set aside for fraud, *A.* cannot be made a party. *Taylor v. Rochfort*, P. 1751, 2 *Vesey*, 281.] *

[Praying general relief is sufficient. *Cook v. Martyn*, P. 1737, 2 *Atkyns*, 2.]

[Where general relief is prayed in one part of the bill, and particular relief in another, it must stand over to be amended, paying costs of the day. *Semb.* if the particular relief is improper. *Ibid.*]

[If a bill prays general relief, you may at the bar pray particular relief, agreeable to the case made in the bill, but not entirely different from such case; as, if the bill is brought for a rent-charge issuing out of land, you cannot drop that, and insist on the land itself. *Grimes v. French*, H. 1740, 2 *Atkyns*, 141.]

[If a bill prays relief generally, the court may thereupon make a decree for relief in a particular manner; as, if the bill be for a marriage portion, and general relief prayed; if it appears that a fine was intended for the security of the portion, the court, without its being prayed, may decree that a fine shall be levied. R. 2 *Mod.* 91.]

[The bill praying an inquiry into the title, and a specific performance on the defendant's motion after answer, an inquiry was directed as to the title at what time the abstract was delivered, and whether it was sufficient; but the court would not decide upon any matter of relief. *Moss v. Matthews*, 3 *Ves. jun.* 279.]

[The court ordered a bill of foreclosure to stand over to make a judgment creditor, the only incumbrancer not before the court, a party; but would not adopt as a general rule the usual practice to make all incumbrancers parties. *Bishop of Winchester v. Beavor*, at the Rolls, 3 *Ves. jun.* 314.]

[It is not irregular for a bill to have two different aspects, that if one fails, the other may answer the purpose for which it is brought. *Bennet v. Wade*, T. 1742, 2 *Atkyns*, 324.]

[Relief prayed by the bill, but given up at the hearing, must be expressly waived on the record. 1 *Ves. jun.* 197.]

Two bills may be filed upon one *subpœna* against the same defendant. *Vide Pract. Reg. in Chan.* 26.

But if the two bills are for the same cause, and so reported upon a reference, one of them shall be dismissed with costs. *Ibid.*

[If a bill is brought by some creditors in behalf of themselves and others, and another bill by other creditors for the same purposes, the court will suffer both to proceed. In the matter of *Price*, M. 1747, 3 *Atkyns*, 602.]

[A man may bring bill in the name of his assignor, and another in his own name, and the court will not stop proceedings in either. *Gage v. Ld. Stafford*, T. 1750, 1 *Vesey*, 544.]

[But that bill in which he does not prevail will ultimately be dismissed with costs; and that is the proper remedy. *Ibid.* 546.]

After answer, the plaintiff may dismiss his own bill with 20 s. costs. *Dub.* 1 *Ver.* 116.

[After answer, plaintiff may always amend on payment of 20 s. costs; tho' *Hardwicke C.* said he would consider some way how to make defendant a more adequate compensation after a long answer. *Deggs v. Colebrooke*, H. 1738, 1 *Atkyns*, 396.]

[After plea set down, order of course obtained by plaintiff to amend the

the bill, and served on the defendant: plaintiff not appearing when the plea came on to be argued, it was allowed of course with costs. *Jennings v. Pearce*, 1 *Ves. jun.* 447.]

[Motion of course after plea or demurrer, to amend the bill on payment of 20*s.* costs, must state that the plea or demurrer is not set down. *Ibid.* 448.]

[After publication plaintiff cannot amend, without withdrawing his replication. *Anon. H.* 1738, 1 *Atkyns*, 51.]

[Bill amended after answer, costs of the amendment being paid, it is considered as an original bill, and the plaintiff is not bound by offers in the former bill, nor defendant by submissions in his answer. 1 *Ves. jun.* 210.]

[New plaintiff by supplemental bill may impeach a decree on rehearing by petition of the former parties. *Hill v. Chapman*, 1 *Ves. jun.* 405.]

[Matter subsequent to the original bill cannot come by way of amendment, but by way of supplemental bill. *Brown v. Hidgen*, *H.* 1736, 1 *Atkyns*, 291.]

[If bill is brought charging forgery in a lease, and mentioning by way of inducement fraud in trustees who are not made parties, and relief prayed against the forgery only; and there has been a decretal order, and a trial of the forgery; the cause coming on upon the equity reserved shall stand over, and plaintiff bring supplemental bill, charging the fraud, and making the trustees parties. *Jones v. Jones*, *T.* 1744, 3 *Atkyns*, 110.]

[Bill for an account of profit made by breach of trust, and for injunction to prevent recovery at law of another sum under the same circumstances; on the answer coming in, the injunction was dissolved, and the money paid under the judgment; held by the master of the rolls not to be necessary to charge that fact by supplemental bill. *Maffey v. Davies*, 2 *Ves. jun.* 317.]

[A witness to a will must not be made a party to a bill for discovery; but if the will be impeached, as obtained by fraud, the witnesses are proper parties. 2 *Ves. jun.* 643.]

[Bill will lie for discovery of fraud in a policy of insurance, on which an action at law has been commenced; and that the policy may be declared void, and be delivered up to be cancelled. *Semb. French v. Connelly*, 2 *Anstr.* 454.]

[A supplemental bill, properly so called, is a bill brought for new matter since the original filed, and before the hearing; and the defendants in the original must be parties to the supplemental; but if the objection for want of parties is not made at the hearing, it cannot be made when the cause comes on again. *Jones v. Jones*, *P.* 1745, 3 *Atkyns*, 217.]

[After an account decreed, if during the account a party die, a bill to bring the devisee of such party, or other formal party (as a trustee) before the court, is not a supplemental bill, but a supplemental bill in the nature of a bill of revivor; and the defendants in the original bill need not be parties. *Ibid.*]

But now, by the *stat.* 4 & 5 *Ann.* 16. the plaintiff shall pay full costs to be taxed by a master, if he dismiss his own bill, or the defendant dismiss it for want of prosecution.

And after a decree the plaintiff cannot dismiss his bill. *R. Ca. Ch.* 40.

[A bill brought for discovery merely, and praying no relief, cannot be dismissed for want of prosecution; but defendant may have order for his costs. *Woodcocke v. King*, H. 1738, 1 *Atkyns*, 286.]

[If defendant in equity becomes bankrupt, plaintiff cannot therefore dismiss his bill without paying costs; for bankruptcy is no abatement. *Rutherford v. Miller*, 2 *Anstr.* 458.]

[Bankruptcy of the plaintiff does not abate a suit in equity; and the bill may therefore be dismissed with costs for want of prosecution. *Davidson v. Butler*, 2 *Anstr.* 460. in not. R. contra by Lord Thurlow C. in *Sellas v. Dawson*, 8th Dec. 1790, *ibid.* 458. in not.]

[Plaintiff cannot on motion dismiss his bill without costs, on the ground that the court would have decreed according to the prayer of it, unless it be consented to on the other side. *Anon.* 1 *Ves. jun.* 140.]

[Choses in action, viz. stock, debts, &c. are not liable to creditors, and cannot be touched in equity. *Dundas v. Dutens*, 1 *Ves. jun.* 196.]

[If defence to a bill for specific performance of an agreement for a purchase depends merely on the vendor's want of title, defendant ought to rest on his answer, and not file a cross-bill to have it delivered up, or to prevent an action; for plaintiff must fail at law. *Hilton v. Barrow*, 1 *Ves. jun.* 284.]

[Residuary legatee need not be party to a bill for a specific legacy; but there must be a general account, if assets are not admitted. *Wainwright v. Waterman*, 1 *Ves. jun.* 313.]

[Owner of one moiety of a cargo not a necessary party to a bill against a factor in respect to the other moiety, defendant having kept separate accounts, and having admitted the produce of the last-mentioned moiety to be in his possession. *Weymouth v. Boyer*, 1 *Ves. jun.* 416.]

[To bill by assignee of a judgment, assignor is a necessary party. *Cathcart v. Lewis*, 1 *Ves. jun.* 463. 3 *Bro. Ch. Ca.* 516. S. C.]

[Bill for discovery of money won at play, before plaintiff has assumed the character of a common informer by commencing an action at law, will not lie. *Mynd v. Francis*, 1 *Anstr.* 5.]

(F) Bill of Revivor.

IF the plaintiff or defendant die, his heir or executor, &c. shall have a bill of revivor against the defendant, his heir, or executor, who has his interest. *Vide Pract. Reg. in Chan.* 44.

If husband and wife are defendants, and the husband die, the plaintiff shall have a bill of revivor. *Vide Pract. Reg. in Chan.* 46.

If a woman be plaintiff, and, after an answer to her bill, she marries; the husband and wife ought to have a bill of revivor. *Vide Pract. Reg. in Chan.* 47.

If two executors are plaintiffs, and one dies, there shall be a bill of revivor. *Vide Ca. Ch.* 77.

Or, if one of them marries, where her authority ceased by the will upon the marriage, if that does not appear by the bill. *Ibid.*

If part of the decretal order is omitted in the decree signed and inrolled, the plaintiff may revive the suit by bill of revivor. R. on *Demurrer*, *Ca. Ch.* 37.

So, a defendant may have a bill of revivor as well as a plaintiff. *Abr. Ca.* 2.

[A de-

[A defendant cannot revive, except only when there is a decree to account. *Anon. H. 1748, 3 Atkyns, 691.*]

But if the bill be by husband and wife, and after answer he dies, the wife shall revive, or not, at her election. *Vide Pract. Reg. in Chan. 47.*

[If bill is brought by husband and wife for a demand in her right, and he dies, the cause does not abate. *Anon. H. 1750, 3 Atkyns, 726.*]

If there be a bill of interpleader, and, after a trial directed between the defendants, the plaintiff dies, a bill of revivor is not necessary; for the bill is at an end as to the plaintiff, and the defendants may proceed; for each of them is in the nature of a plaintiff. *1 Ver. 351.*

If there be a bill against trustees and a *cestuy que trust* in fee, to have a conveyance to the plaintiff for life, and afterwards to his issue in tail, and the *cestuy que trust* dies after a decree for the conveyance, the trustees may convey without a bill of revivor; for the death of one plaintiff or defendant abates the suit only as to himself, and a revivor is not necessary, where nothing is to be done by the representatives of him who is dead. *Abr. Ca. 2.*

[Tho' by *stat. 8 W. 3.* a suit shall not abate by the death of one defendant, yet it must be taken with this restriction, that the subject-matter of the bill is not hurt by such defendant's death. *Brown v. Hidgen, H. 1736, 1 Atkyns, 291.*]

So, if a bill be against a *feme-sole*, who, after answer, marries, there is no need of a bill of revivor; for the husband shall be concluded by her answer. *Vide Pract. Reg. in Chan. 46, 7.*

So, if there be a bill by a *feme-sole*, and before answer she marries, it is not necessary. *Vide Pract. Reg. in Chan. 48.*

If joint-tenants, joint-obligees, obligors, or executors sue, and one of them dies after answer, there is no need of a bill of revivor for the survivor; because the interest survives. *Vide Pract. Reg. in Chan. 47.*

[If two plaintiffs, and one dies after bill filed and *subpoena* served but not returned, and the other without reviving takes out attachment, and defendant (it being in vacation) answers; the answer shall not be taken off the file, nor a bill of revivor brought; for if the suit is abated, defendant will have the benefit of it at the hearing. *Lasco v. Moys, H. 1723, Bunb. 144.*]

So, if an administrator, as guardian to an infant executor, sues, and *pendente lite* the infant comes of full age, it is not necessary. *Vide Pract. Reg. in Chan. 48.*

An assignee or a purchaser shall not have a bill of revivor for want of privity. *Semb. 1 Ver. 283. 427. Abr. Ca. 3.*

No one shall be made party to a bill of revivor who is not in privity. *Ca. Ch. 151. Vide in marg.*

A devisee shall not have a bill of revivor; for he does not represent the testator, but is in nature of a purchaser. *Ca. Ch. 174.*

If the plaintiff dies after a decree, before costs taxed, no bill of revivor lies for the costs. *R. upon a Plea, 2 Ca. Ch. 7.*

[But if costs have been taxed and ordered to be paid into the bank, this circumstance takes the case out of the general rule, and a bill of revivor will lie. *1 Brown. Ch. Rep. 438.*]

[A bill of revivor may be brought for duty and costs not taxed in defendant's lifetime, but not for costs alone. *Dodson v. Oliver*, H. 1723, *Bunb.* 160.]

But notice to one in the remainder, of a bill of revivor, was proper, tho' it was not necessary to make him a party, not being in privity. *Ca. Ch.* 151. *Vide in marg.*

A creditor, allowed by order to prove his debt, may revive, tho' he was not a plaintiff originally. *Abr. Ca.* 3.

[If defendant by answer only (not by plea or demurrer) insists plaintiff is not entitled to revive, yet the court on motion will order the proceedings to stand revived; but if plaintiff does not shew he has a good title to revive, he will take nothing by his suit at the hearing. *Harris v. Pollard*, H. 1734, 3 *P. W.* 348.]

A bill of revivor pursues the first bill; for if there be a variance, it will be dismissed. *Vide Pract. Reg. in Chan.* 45.

He who revives, after revivor, stands in the same condition as his predecessor.

If a bill of revivor revives more than it ought, it will be bad. *R. upon Demurrer*, *Ca. Ch.* 77.

If it revive the whole decree, which was to pay money and to convey land, it may stand as to the personalty, if the executor only revives, and not as to the realty; tho' the demurrer be general to the whole. *Abr. Ca.* 4.

But any plaintiff may be omitted in a bill of revivor, who was plaintiff to the former bill. *D. 2 Ca. Ch.* 80.

And if the bill of revivor alleges a release, by the plaintiff omitted, to the other plaintiffs, and prays an answer, it is no material variance. *R. 2 Ca. Ch.* 80.

So, a defendant, who had not put in his answer, may be omitted. *1 Ver.* 308.

So, if one plaintiff refuses to join in revivor, the other shall revive against him and the other defendants. *Abr. Ca.* 2.

If husband and wife are defendants, and after answer the husband dies, she shall answer *de novo* to the bill of revivor, or her first answer shall stand, at her election. *Vide Pract. Reg. in Chan.* 46.

If an answer to a bill of revivor, of part of an order omitted in the inrolment of the decree, draws into re-examination matters formerly settled, an order shall be made, that such matters be not re-examined. *Ca. Ch.* 56.

A bill of revivor is not allowed after thirty years. *2 Ca. Ch.* 216.

And a plaintiff, upon an abatement of the suit, may have a bill of revivor, or an original bill, at his election. *1 Ver.* 463.

If a defendant, served with process upon a bill of revivor in the *Exchequer*, does not answer, nor pray a commission within eight days, the proceedings shall be revived upon motion. *Rules and Orders in the Exchequer*, 17. *Rule* 43.

[If assignees of a bankrupt bring a bill, and obtain a decree nisi against defendants who make default, and then new assignees are chosen, who bring supplemental bill in the nature of a bill of revivor, they shall stand in the place of the former, and may serve defaulters with *subpœna* to shew cause. *Brown v. Martin*, *P.* 1745, 3 *Atkyns*, 218.]

[It a decree is signed and inrolled, upon a *subpœna scire facias* it may

may be revived without appearance. *Semb. Wharam v. Broughton, M. 1748, 1 Vesey, 180.*

[If a suit has abated, the court by consent of parties may order money to be paid out of court without revivor, or may declare that a party is entitled to so much. *Beard v. Earl Powis, T. 1751, 2 Vesey, 399.*

(G) Bill of Review.

AFTER the dismissal of a bill, upon a full hearing, and this dismissal signed and inrolled, the cause shall not be retained, but by bill of review for special cause. *Vide Pract. Reg. in Chan. 51.*

Vide Re-hearing, post. (Y 5.)

Nor, shall the decree be reversed or altered, but upon a bill of review, unless it be for a miscasting. *Vide Pract. Reg. in Chan. 51.*

[If the decree is inrolled, there cannot be a re-hearing, nor relief on an original bill; and the only remedy is by bill of review, which must be either for error on the face of the decree, or for new matter discovered since. *Taylor v. Sharp, T. 1735, 3 P. W. 371.*; which was in being at the time of the decree, but not known to the party till afterwards. *2 Atkyns, 178.*]

[If the decree is not signed and inrolled, a bill in the nature of a bill of review may be brought, it being fruitless to make a man sign and inrol a decree against himself, to entitle him to bring a bill of review. *Standish v. Radley, P. 1741, 2 Atkyns, 177. Lewellin v. Mackworth, T. 1740, 2 Atkyns, 40.*]

[There must be probable cause made, that the new matter will be relevant; as, if after a decree in favour of parties claiming under a settlement, deeds are discovered which make it possible that the maker of it had not power to make it. *E. Portsmouth v. E. Effingham, P. 1750, 1 Vesey, 430. Bennet v. Lee, H. 1742, 2 Atkyns, 529.*]

[If supplemental bill is brought for new matter discovered; if there is none, defendant must avail himself of it by plea or demurrer, but cannot at hearing. *Lewellin v. Mackworth, T. 1740, 2 Atkyns, 40.*]

[On a supplemental bill in nature of a bill of review, there must be a petition to re-hear or appeal. *Moore v. Moore, T. 1755, 2 Vesey, 596.*]

But for cause apparent in the decree it may be reviewed; as, if land in capite be all devised for payment of debts, and so decreed, where by statute it is void for a third part, *R. 1 Rol. 382. l. 10.*

So, if the decree be founded upon a mistake of the law; for a review is in nature of a writ of error. *R. 1 Rol. 382. l. 10.*

Or, upon a mistake in conscience, upon the proof before the chancellor; and that is the usual course. *1 Rol. 282. l. 35.*

Or, for defect in the words of the decree. *2 Ca. Ch. 162.*

Or, for want of jurisdiction in the court, *1 Ver. 292.*

And there may be a review of a decree for the plaintiff for less than was due, as well as upon a dismissal, or a decree against him, *Ca. Ch. 53.*

No review shall be allowed, but for error apparent in the decree, *Ca. Ch. 54.*

Or, upon affidavit of new matter arising since the decree made;

for neglecting to have evidence, which was known to the party, at the time of the decree, is not cause for a review. *Ca. Ch.* 43. *1 Ver.* 166. *Eq. Ca.* 184.

[But the construction of the rule has not been so strict, as that the new proof must not come to the party's knowledge till after the cause has been heard; it is sufficient if it did not come to his knowledge till after publication, or when by the rules of the court he could not make use of it. *3 Atkyns*, 35.]

Nor, the confession of the party since the decree. *Ca. Ch.* 43.

Nor, the misreciting of a fact or proof by the decree; for that is a record; and if the decree be pursuant to the fact there recited, a review shall not be allowed. *R. Ca. Ch.* 54.

Nor, till a recognizance given to the master for payment of the costs and damages. *Vide Pract. Reg. in Chan.* 51.

[No supplemental or new bill in nature of a bill of review, grounded on new matter since the decree, shall be exhibited without leave of the court, and depositing 50*l.* to answer costs and damages, *General Order*, 17 Oct. 1741, *2 Atkyns*, 139.]

Nor, in the *Exchequer* till costs paid, and a recognizance to perform the former decree, and to pay the further costs; otherwise, there need be no answer to it. *Rules and Orders in Exchequer*, 13. *Rule* 33.

Nor, in *Chancery* till he has obeyed the first decree; as, if he have paid the money, delivered writings, or the possession of land decreed; yet the court has dispensed with this rule upon good security given for the payment of the money, &c. *14 Car.* 2. *Ca. Ch.* 42. *1 Ver.* 117.

But if the decree be for the extinguishment of a right, conveyance of land, release of a debt, cancelling of writings, &c. performance may be deferred, by order of court, till the hearing of the cause upon the bill of review. *Vide Pract. Reg. in Chan.* 52.

So, upon an *offdavit*, that the plaintiff is not able to pay, and the defendant has land in execution for costs. *1 Ver.* 264.

No time is limited for a review, but after long acquiescence the error ought to be apparent. *1 Ver.* 287. 293.

[The court is very tender of permitting a bill of review after a long time, and will not do it unless the petitioners bring themselves very clearly within Lord Bacon's rules. *Norris v. Leneve*, *H.* 1743, *3 Atkyns*, 26.]

[The court will not grant a bill of review, when an account was directed and taken on a foreclosure bill, and the report confirmed some years before; and it appears that the defendant's agent, attorney, and solicitor, attended the master for him. *Gould v. Tancred*, *H.* 1742, *2 Atkyns*, 533.]

Upon a review, no witness shall be examined to a matter, upon which an examination might have been upon the first bill. *Vide Pract. Reg. in Chan.* 53. *Vide supra.*

[On arguing a demurrer to a bill of review, nothing can be read but what appears on the face of the decree; but after demurrer overruled, plaintiff may read bill, answer, or any evidence, as at a rehearing. *Catterall v. Purchase*, *T.* 1738, *1 Atkyns*, 290.]

[Papers in the hands of one of the parties before, but not discovered till after the decree, may be read on a bill of review. *Standish v. Radley*, *P.* 1741, *2 Atkyns*, 177.] [if

[If a party in the first cause has examined to establish a particular point, the court will not suffer him to bring a new bill, to contradict what he attempted to prove in the first; as, first, to prove a man sane, and then to prove him insane. *Bennet v. Lee, H. 1742, 2 Atkyns, 529.*]

It is not cause for a review, that the suit was abated by the death of the defendant before the decree. *R. Ca. Ch. 122.*

Or, that a fact is false; for there can be no new examination after publication. *R. 1 Rol. 382. l. 30. Ch. R. 37.*

Or, that there was a verdict, and a sentence in the ecclesiastical court afterwards to the contrary. *1 Ch. R. 25.*

No review shall be allowed for him who is not privy to the first decree; not for a devisee of the plaintiff in the first bill. *Ca. Ch. 123.*

But where four defend for all the inhabitants of such a place, another inhabitant, not party or privy to any of the four defendants, shall have a review. *Ca. Ch. 272.*

Nor, shall a review be allowed against him, who is no party, or privy.

Nor, for him, who has released his equity, before the decree. *Semb. Ca. Ch. 107.*

No review shall be admitted after a bill of review; for that would be infinite. *7 Co. 45. b. 2 Cro. 186. [7 Co. and 2 Cro. are upon bills of revivor.] R. 2 Ca. Ch. 133. 1 Ver. 135. 441.*

Tho' the first bill was dismissed, without answer, &c. *R. 2 Ca. Ch. 133.*

Or, there be an apparent error. *1 Ver. 417. Vide 2 Ca. Ch. 133.*

But a bill of review may be by one defendant only, who is *pars gravata*. *R. Hard. 50.*

So, where the plaintiff has no estate or title, but in equity. *Hard. 50.*

So, if trustees have obtained decrees, and afterwards are changed, the new as well as the old trustees may be parties to a review. *Hard. 104.*

[Tho' a bill of review cannot, in general, be brought to reverse a decree after twenty years, that bar does not apply to persons having contingent interests, and then not existing or under disabilities: The testator being married, and in ill health, devised the estates in question, *after failure of issue male of his own body*, (and issue male would have taken under his marriage settlement,) to the defendant (who was his heir at law) for life, with remainders over; Lord Northington declared, that the devise, being after a general failure of issue male, was too remote and void, and that the defendant took as heir at law: that declaration reversed upon a bill of review. *Lytton v. Lytton, 4 Bro. C. C. 441.*]

[Commission of review granted on a sentence of the court of delegates, affirming a sentence of the prerogative court, establishing a will. *Matthews v. Warner, 4 Ves. jun. 186.*]

As to a *certiorari* bill, *vide post.* (2 O 1.)

As to a bill of interpleader, *vide post.* (3 T).

(H) Demurrer.

(H 1.) When it lies, and when not.

IF a bill be filed, and the defendant appears, he may demur, plead, or answer, or otherwise all process shall issue against him, as if he had not appeared.

[If defendant has demurred to a bill, and his demurrer has been over-ruled, he cannot demur again to the same bill; but if the bill has been amended, he may then demur again. *2 Brown. Ch. Rep. 66.*]

[The defendant may demur if the bill is for a matter or sum below the dignity of the court, and it will be dismissed, or upon motion: but if there is fraud, or complicated matter, it will be retained, however small. *Per Price, B. M. 1717, Bunb. 17.*]

[If bill is brought for relief against several contracts for shares of the same stock bought of the defendant severally, and charges that they had formed themselves into a society to carry on the fraud, yet demurrer lies. *N. B. Defendants must deny combination. Bull v. Allen, in Sc. H. 1720, Bunb. 69.*]

Tho' defendant does not demur to a bill, as being too trifling for the court to entertain, yet he may take advantage of it at the hearing. *Brace v. Taylor, H. 1741, 2 Atkyns, 253.*

[For a bill may be so drawn as to prevent a demurrer for this cause.]

A defendant may demur, if the bill be for relief in a matter not proper for the court; as, if a bill of revivor revive an order made by the consent of the plaintiff, now married, and not a party; for her consent is determined. *R. Ca. Ch. 77.*

[A demurrer will be allowed to a bill for a conveyance of a more legal estate; as, where *W. T.* devised to his wife for life, remainder to trustees to preserve contingent remainders; remainder to his daughter for life; remainder to trustees as before; remainder to the heirs of her body; remainder over in a subsequent clause; he declared his intention that his daughter should have only a life-estate. A bill being filed by the remainder-man in fee to have a conveyance in which the daughter should take only an estate for life, the defendants demurred, and the demurrer was allowed, on the ground that these were only legal estates. *1 Brown. Ch. Rep. 313.*]

[If plaintiff prays injunction to a *mandamus* from *B. R.*, or to an indictment, information, or prohibition, defendant may demur. *Ld. Montague v. Dudman, T. 1751, 2 Vesey, 396.*]

[If bill is brought to establish plaintiff's right of common, and set aside former decrees, demurrer lies to the whole bill, for plaintiff ought to have brought bill of review. *Lady Granville v. Ramsden, in Sc. H. 1719, Bunb. 56.*]

[Tho' defendant has answered original bill, he may demur to the amended part. *Lowther v. Whorwood, M. 1722, Bunb. 120.*]

[Defendant may demur, if there are not sufficient parties; as, if a jointress brings bill against heir at law to have a covenant of her husband (to leave a jointure-house in repair) performed, and satisfaction for the want of it, the heir may demur, for that the executor ought to be a party; for tho' at law the creditor may sue the heir only, where he is bound, yet as the personal estate is the natural fund
for

for debts, and the executor may shew he has performed the covenant, he must be a party in equity. *Knight v. Knight*, M. 1734, 3 P.W.

331.]

[If the defendant do not demur for want of parties, he may take exceptions for it, at the hearing.]

[Yet if administrator with the will annexed is a defendant, another defendant shall not demur, because it does not appear that the executor did not leave an executor; for the court will presume the administration to be right. *Tourton v. Flower*, T. 1735, 3 P.W. 369.]

[But if plaintiff has taken out administration in a proper court in a foreign country, our courts can take no notice of it; and if he has not also taken it out here, defendant may demur. *Ibid.*]

[If an estate is charged with 10*l* per ann. wages to the knight of a shire, and a right given to a corporation, consisting only of the two knights and the sheriff, to enter and distrain, and one knight and the sheriff refuse to join in recovering it, and the other brings bill for it, defendant may demur. *Shepherd v. Cotton*, T. 1747, 1 Vesey, 38.]

[If a crew of 80 appoint two of their number agents for prizes, and afterwards 64 of them agree the two agents shall have certain shares, and bill is brought in behalf of the agents and the 64, demurrer lies, for the whole 80 should be parties. *Leigh v. Thomas*, T. 1751, 2 Vesey, 312.]

[To a bill brought for injunction to stay proceedings in ecclesiastical court for a church-rate, to which a custom was pleaded, and plea admitted, and for discovery of the value of estates, defendant may demur, for they are cognizable there. *Dun v. Coates*, M. 1738, 1 Atkyns, 288.]

[If the lord of one manor brings a bill against the lord of another manor, to establish a right and be quieted in the possession of a fishery, defendant may demur, for the right should be first tried at law. *Ld. Tenham v. Herbert*, 1742, 2 Atkyns, 483.]

[If the executor of an attorney brings bill for money due for business done, defendant may demur, for that the remedy is at law under 2 G. 2. c. 23. *Parry v. Owen*, T. 1751, 3 Atkyns, 740.]

[If there is a decree to account, an estate to be sold, and the money paid to incumbrancers according to priority, and afterwards plaintiff discovers and buys in incumbrances prior to defendant, and brings bill to tack his mortgage to these, defendant may demur. *Wortley v. Birkhead*, T. 1754, 3 Atkyns, 809.]

[If the lord of a market brings bill for toll of corn brought to market, and that defendant combines to sell by sample at his house, and thereby prevents corn being brought to market, which is forestalling, and prays discovery; these are law questions, and defendant may demur. *Hawley v. Taylor*, M. 1754, 3 Atkyns, 815.]

[If a supplemental bill is brought against a defendant, no party to the original bill, to answer the matters in the original bill, and no new matter is pretended to be arisen since filing the original bill, defendant may demur. *Baldwin v. Mackown*, M. 1754, 3 Atkyns, 817.]

[If a bill is brought for discovery of assignment of a lease without licence, tho' it is not brought for the forfeiture, yet does not expressly waive the forfeiture, defendant may demur. *Ld. Uxbridge v. Staveland*, M. 1747, 1 Vesey, 56.]

[Defendant]

[Defendant may demur to a bill brought by the *East India Company*, to discover how he came by possession of certain goods, and whether not by acts amounting to piracy or felony. *E. I. Co. v. Campbell*, T. 1749, 1 *Vesey*, 246. *in Sc.*]

[But demurrer does not lie to a bill for discovery of a conspiracy, in setting up a *bastard* child; for it is not a ground for criminal prosecution, *Chetwynd v. Lindon*, T. 1752, 2 *Vesey*, 450.]

[Nor can defendant to whom lands are devised, charged to be an alien, demur to the discovery; for the disability of an alien to hold lands is not a penalty nor a forfeiture, but an incapacity; nor to a discovery whether another defendant is an alien, if first defendant hath an interest (tho' uncertain) in the lands. *Att. Gen. v. Duplessis*, H. 25 G. 2. *Parker*, 144.]

So, he may demur, if the plaintiff does not entitle himself to the thing demanded; as, if the husband sue alone, for a thing to which he has no title without joining his wife. *Ca. Ch.* 41.

[If a baptist assigns an advowson for a term, and, on conforming, brings bill for re-assignment, suggesting it was in trust for himself to avoid the penalties, the defendant may demur. *Cottingham v. Fletcher*, H. 1740, 2 *Atkyns*, 155.]

[To a bill brought by a protestant next of kin, for account of a rent-charge settled on a papist on marriage, defendant may demur, for the purchase or grant is void. *Michaux v. Grove*, T. 1741, 2 *Atkyns*, 210.]

[If a bill brought for real estate seeks discovery of proceedings in the court of delegates, defendant may demur, for they relate only to personal estate. *Baker v. Pritchard*, T. 1742, 2 *Atkyns*, 387.]

[If a bill is brought for an injunction, and to establish a right which is for a monopoly, and doubtful, and where the proceedings would be long and expensive, the court will allow a demurrer; for that plaintiff should have first established his right at law. *Whitchurch v. Hide*, T. 1742, 2 *Atkyns*, 391.]

If the bill demand an account of an estate from an executor, upon a clause in the will of his testator, who devises a moiety of the estate, which his wife and executor shall have at his death to the plaintiff. *Ch. R.* 31.

If the bill demand a discovery of a title against a devisee, where the plaintiff does not shew a title in himself. *R. Ch. R.* 36.

[If the lord of a manor brings bill for recovery of a fine, suggesting that defendant was admitted by attorney, but denies it, and for arrears of quit-rents, the lands out of which they issue being unknown, and defendant demurs as to relief, the demurrer is good. *North v. E. Strafford*, M. 1732, 3 *P. W.* 148.]

[If the bill does not aver defendant to the assignee, but only that plaintiff is so informed, defendant may demur. *Ld. Uxbridge v. Staveland*, M. 1747, 1 *Vesey*, 56.]

[If it is upon a collateral covenant, not running with the estate, and which therefore does not bind assignees, an assignee defendant may demur. *Ibid.*]

So, if the plaintiff demand things of several natures against several defendants in the same bill, if the defendants deny the combination charged; otherwise not. 1 *Ver.* 416.

And they ought to deny combination, without more; for more over-rules the demurrer. 1 *Ver.* 463. [Yet

[Yet where there has been possession of a fishery for a long time, he who claims the sole right may bring a bill to be quieted in possession, tho' he has not established his right at law; and it is not good cause of demurrer, that defendants have distinct rights, for on an issue to try the general right, they may take advantage of them. *Mayor of York v. Pilkington*, M. 1737, 1 *Atkyns*, 282.]

So, if the plaintiff sues before cause of action; as, if he sues an executor for a discovery of assets before a suit commenced against him; for perhaps he would pay, or confess assets. *Semb. Hard.* 115.

[It is good cause of demurrer, that it appears by the bill that defendant has been in uninterrupted possession for 34 years, and no incapacity pretended. *Frazer v. Moore*, in Sc. M. 1719, *Bunb.* 54.]

[A trustee may demur as well as the *cestuy que trust*, and the *cestuy que trust* is entitled to have the privilege maintained by the trustee. *E. Suffolk v. Green*, T. 1739, 1 *Atkyns*, 450.]

[If discovery is sought, whether defendant did not procure subornation of perjury, and whether the evidence of A. did not influence a verdict, defendant may demur to both as one question. *Baker v. Pritchard*, T. 1742, 2 *Atkyns*, 387.]

[If a legacy is given to a woman provided she may marry with consent, if not, given over, she may demur to a bill for a discovery of her marriage. *Chauncey v. Tabourden*, T. 1742, 2 *Atkyns*, 392.]

[If a portion is given over, on marriage without consent, defendant may demur to discovery of the marriage only, tho' discovery of the consent is not prayed. *Chancey v. Fenboulet*, P. 1751, 2 *Vesey*, 265.]

[But if a man by his will gives his wife the whole surplus of his personal estate, but if she marry again, then she is to deliver up half of the surplus to his brother and his heirs, and he shall call her to an account for it; a demurrer to a bill for a discovery of her marriage, and for an account, shall be over-ruled. *Lucas v. Evans*, T. 1745, 3 *Atkyns*, 260.]

[On a *quare impedit* brought against the ordinary, he filed a bill for a discovery whether there was not a bond for resignation given, in order to plead it to the action: the defendant demurred, 1st, that the discovery would subject him to penalties; 2dly, that it was immaterial. To the first objection it was answered, that the bond was legal; to the second, that the plaintiff had a right to the discovery, and its materiality must be debated in another place: and the demurrer was over-ruled. 1 *Brown. Ch. Rep.* 96. But *quare* whether a demurrer in such a case on the first ground would not now be allowed? for tho' in this case both C. B. and B. R. held the bond to be legal, yet the judgment was reversed on a writ of error in parliament. *Ibid.* 98.]

[Demurrer lies to a bill brought to discover whether there is such a person, or where he is, only to make him a party. *Dinely v. Dinely*, T. 1742, 2 *Atkyns*, 394.]

[If a bill is brought to discover whether defendant, after being instituted, &c. to one living, was not instituted, &c. to another, he may demur. *Boteler v. Allington*, H. 1746, 3 *Atkyns*, 453.]

But it is no cause for a demurrer, that the plaintiff suggests, that the court-roll, (by which the defendant claims a copyhold,) was falsely entred by the steward, tho' the defendant alleges, that the homage had found the entry to be true.

That

That the bill contains scandalous matter ; for that ought to be referred and expunged. *Semb. 1 Ver. 107.*

[If an officer of a company is made defendant to a bill against the company for a discovery, tho' an officer is not interested, and his answer cannot be read against the company, and he may be examined as a witness, and plaintiff can have no decree against him ; yet as his answer may tend to a discovery, as he may be prosecuted for perjury, and company cannot, and as his answer may direct plaintiff to draw interrogatories, he shall not demur, but shall answer. *Wych v. Meal, T. 1734, 3 P. W. 311. Vide 1 Brown. Ch. Rep. 469.*]

[If a bill is brought for the recovery of a curiosity found in plaintiff's manor, and sold to defendant und-faced ; defendant cannot demur, tho' plaintiff might have *trover* for the value, or *detinue* for the thing itself. *D. Somerset v. Cookson, M. 1735, 3 P. W. 390.*]

[It is not good cause of demurrer to a bill brought for an account of personal estate that there is a suit depending in the spiritual court for administration, for they have no way of securing the effects in the mean time. *Phipps v. Steward, H. 1737, 2 Atkyns, 285.*]

[It is not a good cause of demurrer, to a bill for a commission to examine witnesses, and for a discovery of matters which the plaintiff may give in evidence in an action which he *intends* to bring, that the action is not yet commenced ; it is sufficient if there appear on the bill sufficient grounds for an action. *1 Brown. Ch. Rep. 469.*]

[Demurrer lies not to a bill for discovery of what goods defendant bought of plaintiff's agent, and what remains unpaid, and for payment of it. *Lisset v. Reave, T. 1742, 2 Atkyns, 394.*]

The plaintiff cannot demur to an answer, tho' it draws a matter into examination, which was settled before by a decree ; but ought to move for an order to restrain such examination. *R. Ca. Ch. 56.*]

So, the defendant cannot demur, if he is in contempt, or answers by commission.

[A defendant cannot demur and plead, or demur and answer to the same part of bill ; for the plea or answer over-rules the demurrer. *Jones v. E. Strafford, M. 1730, 3 P. W. 79.*]

[So, if to a bill for an account of rents and profits, to which discovery is incident, the demurrer, as to so much as seeks an account from a certain time, is that plaintiff has his remedy at law ; and the plea as to so much as seeks an account before filing supplemental bill, is the statute of limitations ; the demurrer and plea shall be both over-ruled. *Dormer v. Fortescue, H. 1741, 2 Atkyns, 282.*]

[If a demurrer is over-ruled, defendant may afterwards insist on the same thing in his answer. *Ibid.*]

[The court will not determine the construction of a will on demurrer, if there is any doubt, but will over-rule it without prejudice to defendant's insisting on the same matters by answer ; but if on the face of the bill plaintiff has no title, the court will determine on demurrer. *Brentford v. Edwards, H. 1750, 2 Vesey, 243.*]

[A demurrer bad in part is void for the whole. *E. Suffolk v. Green, T. 1739, 1 Atkyns, 450.*]

[So, if a trustee in an usurious bond defendant to a bill for discovery, and to perpetuate testimony, demurs to both, it is bad ; had it been only to the discovery, good. *Ibid.*]

[A demurrer for want of jurisdiction is informal and improper, defendant

defendant should plead to the jurisdiction. *Roberdeau v. Rous*, *M.* 1738, 1 *Atkyns*, 543.]

[Length of time is not proper matter for a demurrer, but for a plea. *Gregor v. Molefworth*, *M.* 1740, 2 *Vesey*, 109.]

[If defendant answers to part of the discovery, he cannot demur to other part. *Abraham v. Dodgson*, *H.* 1740, 2 *Atkyns*, 157.]

[But defendant may answer to the discovery, and demur to the relief. *Ibid.*]

[But there cannot be a demurrer to the discovery without a demurrer to the relief, for that would be not to demur to the thing required, but to the means by which it is to be obtained. 2 *Brown. Ch. Rep.* 124.]

[Where a bill proper for discovery only, also prays relief, a general demurrer will be allowed. *Cont.* 2 *Brown. Ch. Rep.* 281. *Acc. id.* 319.]

[The court cannot let a demurrer stand for an answer. *Anon.* *T.* 1747, 3 *Atkyns*, 530.]

[If the bill charges, that by producing a deed under which defendant claims, it will appear it was made by a tenant for life only, and defendant does not plead, he is a purchaser, but demurs to the whole, it is not good. *Stroud v. Deacon*, *T.* 1747, 1 *Vesey*, 37.]

[Defendant cannot demur to a bill for partition of tythes, for this court can divide them. *Baxter v. Knollys*, *T.* 1750, 1 *Vesey*, 494.]

[No benefit of exception can be saved on a demurrer. *Gregor v. Molefworth*, *M.* 1740, 2 *Vesey*, 109.]

[The particulars which are demurred (or pleaded) to, must be distinguished; it is not enough to say, as to so much of the bill as is not after answered, &c. *Chetwynd v. Lindon*, *T.* 1752, 2 *Vesey*, 450.]

[Bill filed 1793, by mortgagor or mortgagee for redemption, stating that in or about the year 1770, *A.*, the ancestor of plaintiff, died, and that soon after plaintiff took possession: demurrer, for that the bill stated only, that in or about the year 1770, "which is upwards of 20 years before the bill filed," &c. over-ruled, as being a speaking demurrer. *Edsell v. Buchanan*, 2 *Ves. jun.* 83.]

[Demurrer to a bill lies where taking its charges to be true it would be dismissed at the hearing. *Utterston v. Muir*, 2 *Ves. jun.* 97. 4 *Br. C. C.* 270. *S. C.*]

[Demurrer to bill of revivor, as being for costs only; over-ruled, because it did not appear on the bill that the decree had been executed. *Morgan v. Scudamore*, 2 *Ves. jun.* 313.]

[Demurrer to a bill, including joint and separate demands, allowed. *Harrison v. Hogg*, 2 *Ves. jun.* 323.]

[On bills by rectors and vicars, defendants may split their titles in their defence, *ibid.* 328.; but people setting up different farm modules may not join. *Semb. ibid.*]

[No demurrer, because feoffment is stated without stating livery, or a bargain and sale without stating inolment; they will be intended perfect. *Ibid.*]

[Bill for discovery and delivery of a settlement under which the plaintiffs claimed, and other title-deeds, and possession of the estate: demurrer to all the relief and to all the discovery, except of the settlement, for want of equity. The answer admitted the settlement, and

and offered to produce it, and denied that defendant had any other deed relative to the plaintiff's title; the title being legal, the court would only order the settlement to be produced at the trial; but that being a species of relief, the court thought the answer had over-ruled the demurrer, and gave defendant leave to amend. *Renison v. Asbley*, 2 *Ves. jun.* 459.]

[Where the plaintiff is entitled to the discovery he seeks, prayer for general relief, or for relief, which is consequential to the prayer for discovery, will not sustain a demurrer. *Brandon v. Sands*, 2 *Ves. jun.* 514.]

[Bill against bankrupt and assignees, charging a fraudulent bankruptcy to defeat the plaintiff's execution, and stating, that under an agreement with the assignees for an arbitration, the plaintiff deposited the goods for sale, in trust for the party in whose favour the award should be made; that he had lost his copy of the agreement, and the assignees had obtained possession of the original, and refused inspection; the bill prayed a discovery, and injunction; demurrer by the bankrupt disallowed. *King v. Martin*, 2 *Ves. jun.* 641.]

[Bill prayed that defendant might state the particulars of his pedigree, as heir, and of the births, baptisms, marriages, deaths, or burials of all the persons therein to be named. Demurrer thereto allowed. *Ivy v. Kekewich*, 2 *Ves. jun.* 679.]

[The plaintiff was tenant to the father of the defendants of a colliery, under a lease and subsequent agreement: on the father's death, plaintiff continued to hold under one of the defendants as heir on the same terms, and filed a bill against the two defendants as executors of their father, and against one of them as heir, for an account of coals wrought and vended, both in the lifetime of the father and since his death. Defendants demurred separately, as being improperly joined in the suit. Demurrers allowed. *Ward v. Duke of Northumberland and Earl of Beverley*, 2 *Anstr.* 469.]

[Bill charging that the defendants had got the title-deeds, and mixed the boundaries, prayed a discovery, possession, and an account. Demurrer thereto allowed. *Loker v. Rolle*, 3 *Ves. jun.* 4.]

[A debtor of a bankrupt being sued at law by the assignees, filed a bill for discovery, whether they had not signed his certificate in consideration of his giving evidence in the action. Demurrer allowed. *Selby v. Crew and others*, 2 *Anstr.* 504.]

[Action on bills of exchange: bill to have them delivered up, as being given on a gaming transaction. Demurrer over ruled. *Newman v. Franco*, 2 *Anstr.* 519. *Andrews v. Berry*, 3 *Anstr.* 634. S. P.]

[A. sued B. at law on an indemnity bond, B. filed a bill for an injunction without offering to make A. any recompence for the damage he had actually sustained. Demurrer allowed. *Godbolt v. Watts*, 2 *Anstr.* 543.]

[Demurrer admits only facts well pleaded, and the facts alone, without the conclusion of law. 1 *Ves. jun.* 78. 289.]

[Demurrer allowed to a bill charging fraud too loosely. *East India Company v. Henchman*, 1 *Ves. jun.* 287.]

[Charge that defendant was appointed resident at the East India Company's factory at M., not a sufficient charge that he was factor. *Ibid.* 290.]

[Demurrer to a bill to perpetuate testimony to a right of common, and

and way, because charged too generally. *Croft v. Milton*, 1 *Ves. jun.* 449. 3 *Bro. C. C.* 481. *S. C.*]

[A demurrer to the relief is over-ruled by an answer to the discovery of the facts on which the relief is prayed. *Roberts v. Clayton*, 3 *Anstr.* 715.]

[On a general demurrer to a bill seeking relief, an objection to the discovery, as subjecting the defendant to penalties, is not competent. *Whittingham v. Burgoyne*, 3 *Anstr.* 900.]

(H 2.) How put into Court, &c.

A demurrer may be put into court upon a general *dedimus*.

Or, under the hand of counsel only, without commission, or in person. *Ord. per Cla. Rules and Orders of Chancery*, 96.

[Defendant may demur at the bar *ore tenus* (tho' he has before put in a demurrer which is over-ruled); and in that case it shall be without costs on either side. *Tourton v. Flower*, T. 1735, 3 *P. W.* 369.]

But after an attachment with proclamation, it shall not be received without leave of the court, upon motion and satisfaction for the delay. *Ord. per Cla. Rules and Orders of Chancery*, 99.

Nor, after motion for time to answer.

Yet, all contempts being pardoned by a general pardon, a demurrer was allowed after proclamation returned. *Ca. Ch.* 238.

[After motion for time to plead, answer, or demur, but not to demur alone, if the defendant demur, and by way of answer only deny combination; this is not a compliance with the terms of the order, and the demurrer will be discharged and ordered to be taken off the file with costs. 1 *Brown. Ch. Rep.* 78. *Vide* 3 *Atkyns*, 726.]

[After a motion for time to answer, a demurrer to part (with answer to part) was put in, and on a reference to the master, he reported it regular, but exception being taken to the report, was allowed. 2 *Brown. Ch. Rep.* 214.]

A demurrer ought to shew the causes for which it is demurred. *Ord. per Cla. Rules and Orders of Chancery*, 97.

Yet, a bill may be dismissed, at the hearing, for causes not shewn upon the demurrer, upon payment of costs for the causes over-ruled. *Vide* 1 *Ver.* 78. *Vide Pract. Reg. in Chan.* 133. *Vide Rules and Orders of Chancery*, 97.

Otherwise, if the defendant had not demurred, but only pleaded. *Vide* 1 *Ver.* 78, 79.

There cannot be a demurrer to a *subpoena* in the nature of a *scire facias*; for a *subpoena* is no record. *Ca. Ch.* 50.

Nor, to an answer which would cause a re-examination of matters before settled. *Ca. Ch.* 56.

The plaintiff, within eight days after a demurrer, may amend his bill, upon payment of 20s. to the defendant's clerk. *Vide Pract. Reg. in Chan.* 133.

Or, he may dismiss his bill upon payment of 40s. without motion; which will be no impediment to a new bill. *Ibid.*

So, by order in the *Exchequer*, if the plaintiff, within two days before the time fixed for hearing, gives notice to the defendant that he admits the demurrer, and pays 20s. costs, the defendant ought not

not to have it heard. *Vide Rules and Orders in Exchequer, §. Rule 11.*

So, if the plaintiff, in such time, gives notice that he will reply to the plea, he may reply within a week without costs; otherwise the defendant shall be dismissed with 30 s. costs. *Ibid.*

If the plaintiff in *Chancery* does not amend or dismiss his bill, the defendant shall enter his demurrer with the register, to be argued in court within eight days after the filing; otherwise it will be disallowed *ex cursu*, as for delay, and the plaintiff shall have a *subpoena* for another answer, and 40 s. costs. *Vide Rules and Orders of Chancery, 97. Vide Pract. Reg. in Chan. 134.*

After such a disallowance, it shall not be argued without motion and leave of the court. *Vide Rules and Orders of Chancery, 97.*

If upon debate the demurrer be allowed, the bill shall be dismissed with costs. *Vide Pract. Reg. in Chan. 133, 4.—*So, by order in the *Exchequer*. *Vide Rules and Orders in Exchequer, 4, 5. Rule 9.*

But there shall be no costs, if the demurrer comes in upon a *dedimus*. *Ord. per Cla. Vide Rules and Orders of Chancery, 96. 1 Ver. 282. Vide Pract. Reg. in Chan. 134.*

If a demurrer or plea be allowed to part, the plaintiff shall pay 30 s. costs.

If a demurrer be over-ruled, the defendant shall pay five marks for costs. *Ord. per Cla. Rules and Orders of Chancery, 96. Vide Pract. Reg. in Chan. 133.*

So, if it be over-ruled for the causes alleged, tho' the bill be dismissed for another cause. *Ibid.*

So, by order in the *Exchequer*, if it be over-ruled, or not set down before the *Saturday* sev'night after it is put in, the defendant shall pay 40 s. and rejoin *gratis*, and join in commission. *Vide Rules and Orders in Exchequer, 4. Rule 9.*

Or, if the defendant, two days before the time fixed for the hearing his plea or demurrer, answers and gives notice thereof to the plaintiff's attorney, he shall pay only 20 s. costs. *Vide Rules and Orders in Exchequer, 5. Rule 9.*

If the demurrer be long and frivolous, the court orders the defendant to pay 5 l. for costs, and that no pleading be afterwards received under the hand of the same counsel.

If the demurrer be for want of title, and the defendant answers to several parts of the bill, he thereby over-rules his demurrer. *Semb. 1 Ver. 90.*

If the demurrer be for want of parties, where the bill is for a discovery of other parties concerned in interest, it will be over-ruled. *1 Ver. 95.*

[General demurrer put in, but never argued, and no proceedings afterwards; the defendant cannot have the bill dismissed, (for want of prosecution,) as he had equally a power to move. *Anon. 2 Ves. jun. 287.*]

(I) Plea.

(I 1.) What is a good Plea, and what not.

[THE use of a plea in equity is to save time, expence, and vexation; therefore if one point will put an end to the whole cause,

it is important to the administration of justice, that it should be pleaded: but a plea containing two different and distinct points does not answer these ends: an answer is a more commodious form, and therefore if such a plea be pleaded, it will be ordered to stand for an answer, with liberty to except. *1 Brown. Ch. Rep. 417, 418.*

[But a plea of a conveyance, and of fine and non-claim, is not multifarious, but a good plea to a bill impeaching the conveyance, as not being for valuable consideration. *1 Brown. Ch. Rep. 274.*]

[The defence proper for a plea must be such as reduces the cause to a particular point, and thence creates a bar to the suit, for not every good defence in equity is likewise good as plea. *Chapman v. Turner, 1739, 1 Atkyns, 54.*]

[A plea that brings no new matter before the court, will be overruled; as, if a defendant plead a sentence in the Admiralty court which is recited in the bill. *1 Brown. Ch. Rep. 57.*]

[The plea must not put a negative on the bill; a denial of the facts stated in the bill is proper for an answer; a plea must confess and avoid. *Semb. 1 Brown. Ch. Rep. 409. 411.*]

[Thus, where the plaintiff deduces his title as heir at law, the defendant cannot plead that the plaintiff is not heir at law, he must deny his title, by way of answer, as explicitly as it is laid. *2 Brown. Ch. Rep. 143.*]

[So, in the case of a purchaser, for valuable consideration, if the bill charge particulars of notice, the defendant must deny all the circumstances particularly, not generally. *Id. 146.*]

The defendants may plead to the bill;

To the jurisdiction of the court; as, *that the parties dwell within a county palatine, and the suit is for land there, or matters local. Semb. Ca. Ch. 41. Vide Franchises, (D 9.)*

But when only one party dwells there, or it be for a thing personal, it is no plea. *Ca. Ch. 41.*

So, it is no plea, *that the university has consuance in all causes in law or equity, where a scholar is a party;* for that does not extend to matters of mere equity. *R. 2 Vent. 362.*

[Plea to the jurisdiction of Chancery (or of any other of the king's superior courts of general jurisdiction) must shew what other court has jurisdiction. *E. Derby v. D. Athol, H. 1748, 1 Vesey, 202.*]

[A plea which covers too much, cannot be allowed for part; as, a plea to the jurisdiction, where plaintiff has a right to a discovery, tho' not to relief. *Ibid.*]

[Or, if a rectory is devised to a college, *in trust*, to present the senior divine then fellow, defendant cannot plead to the jurisdiction, as being in the visitor. *Green v. Rutherford, P. 1750, 1 Vesey, 462.*]

[But if an information is brought for relief, against an undue election to a fellowship in a college, defendant may plead that there is a visitor who has the sole determination of such matters. *Attorney-General v. Talbot, H. 1747, 3 Atkyns, 662. 1 Vesey, 78.*]

To the disability of the plaintiff; as, *that he is excommunicated;* and that shall be shewn under the seal of the ordinary. *Vide Pract. Reg. in Chan. 277, 8.*

[That plaintiff is an alien born, and an alien infidel, not of the Christian faith, is not a good plea to a bill for a personal demand. *Ramkiffenseat v. Barker*, 1737, 1 *Atkyns*, 51.]

[In the plea of *an alien*, defendant must aver that the person was an alien, or it is no bar. *Burk v. Brown*, T. 1742, 2 *Atkyns*, 397.]

[Plea of conviction of capital offence, must be judged with equal strictness here, as if at common law. *Ibid.*]

[Therefore, that *A.* gave *B.* a mortal wound, of which, &c. without saying in what part, is bad. *Ibid.*]

[Or, if it says he was tried at the assises, without saying the person who tried him had a commission of *oyer and terminer*, it is bad. *Ibid.*]

That he is outlawed in another cause; and the outlawry shall be shewn *sub pede sigilli*. *Vide Pract. Reg. in Chan.* 276.

But *outlawry in the same cause for which relief is prayed*, is no plea, but shall be disallowed of course, as for delay, and the plaintiff shall pursue his process for other answer, and 5 marks costs. *Ord. per Cla. Rules and Orders of Chancery*, 97. *Vide Pract. Reg. in Chan.* 277.

And when outlawry in another cause is reversed, the plaintiff upon payment of 20s. to the defendant shall take a *subpœna* against him to answer the same bill. *Ord. per Cla. Rules and Orders of Chancery*, 98. *Vide Pract. Reg. in Chan.* 277.

So, by order in the *Exchequer*, if a plea of outlawry be admitted, or allowed, and the outlawry be reversed, the plaintiff paying the costs, shall take out a new *subpœna* to answer his bill. *Vide Rules and Orders in Exchequer*, 5. *Rule 10.*

If one defendant pleads outlawry in the plaintiff, it is good only for himself. *Ca. Ch.* 3.

Outlawry of an executor is no plea to a suit as executor. 1 *Ver.* 184.

[Plea for want of parties, is in bar to the whole bill, discovery and relief. *Plunket v. Penfon*, T. 1740, 2 *Atkyns*, 51.]

[Plea that the bill is only against representative of real, and not of personal estate, must be allowed, tho' suspected only for delay. *Ibid.*]

[Unless it is suggested that the representation is contesting in the ecclesiastical court. *Ibid.*]

[It is a good plea to a bill for discovery of *assets*, that the administrator is not a party, tho' he is acknowledged to be insolvent. *Asb-hurst v. Eyre*, P. 1740, 2 *Atkyns*, 51.]

[So, a defendant may plead *another suit depending in the same, or another court for the same cause*. *Ord. per Cla. Rules and Orders of Chancery*, 98, 99. *Ca. Ch.* 241.]

[Plea that another action is depending in another court for the same thing, is bad; for plaintiff need not make his election till defendant has answered. *Jones v. E. Strafford*, M. 1730, 3 *P. W.* 79.]

[That the bill is for the same matter for which plaintiff brought another bill, is not a good plea, if the last is brought in a different right; as, if the first is an executor or administrator, the second as administrator *de bonis non*, &c. of intestate. *Huggins v. York-Buildings Company*, T. 1740, 2 *Atkyns*, 44.]

[To support a plea of a former decree, so much of the former bill and answer must be set forth, as to shew the same point was then in issue. *Child v. Gibson*, T. 1743, 2 *Atkyns*, 603.]

[A decree in a former suit for the same matter, cannot be pleaded till it is inrolled. *Anon.* 1754, 3 *Atkyns*, 809.]

[But it may be insisted on by way of answer. *Kensley v. Kensley*, T. 1754, 2 *Ves.* 577.]

[A former decree, signed and inrolled, in which plaintiff was an infant, is a good plea, for an infant plaintiff is bound by a decree as one of age. *Gregory v. Moleworth*, H. 1747, 3 *Atkyns*, 626.]

Or, another bill dismissed for the same cause. *Vide* 1 *Ver.* 310.

Tho' the decree for the dismissal be not signed or inrolled. 1 *Ver.* 310.

[If the representative of a co-administrator brings a bill of revivor and supplemental bill, for the same thing that the two administrators had brought one for before, which, upon the death of one, the other had dismissed, such dismissal is a good plea. *Bowden v. Beauchamp*, M. 1740, 2 *Atkyns*, 82.]

[Plea of decree of foreclosure, and non-payment, is not good, if there has been no final order to foreclose, whatever length of time has elapsed; but it may be a good defence. *Senhouse v. Earl*, T. 1752, 2 *Ves.* 450.]

In the *Exchequer*, if the plaintiff admits this plea of a former suit depending he shall pay 40 s. If it is allowed on the hearing by the court, 3 l. costs. *Vide Rules and Orders in the Exchequer*, 6. Rule 13.

If there be another suit for the same cause at common law, the defendant may move, that the plaintiff may make his election at a day to be fixed by the court, where he will proceed.

So, the defendant may, in *Chancery*, plead another suit dismissed in the *Exchequer* for the same cause. *Vide* *Ca. Ch.* 155, 6.

Otherwise, if the dismissal was *without prejudice in law or equity*. *R. Ca. Ch.* 156.

[A bill dropt for want of prosecution, cannot be pleaded as a decree of dismissal to another bill; nor is it sufficient that the court implied there was no title when they dismissed the bill, an absolute determination of the court that plaintiff had no title, must be shewn. *Brandlyn v. Ord*, M. 1738, 1 *Atkyns*, 571.]

A plea of a former suit ought to shew, that the defendant was served with process or appeared. *Abr. Ca.* 39.

But to a bill by A. against B. for a foreclosure, a former bill in the *Exchequer* by B. for redemption, is no plea. 1 *Ver.* 220.

A plea of former suit shall be without oath; for it ought to be referred to a master whether there be such a suit. 1 *Ver.* 332.

[A plea of another suit depending for the same matter, must set forth when it was instituted. *Foster v. Vassal*, M. 1747, 3 *Atkyns*, 587.]

[If a creditor who has come in and proved his debt before the master, under a decree at the suit of another creditor, brings a new bill, the former suit is a good plea. *Neve v. Weston*, T. 1747, 3 *Atkyns*, 557.]

[If there is a decree for tythes, and the account is depending before

fore the master, defendant may plead this suit and decree to a new bill brought; for the account in this court is taken down to the time of making the report. *Bell v. Read, M. 1747, 3 Atkyns, 590.*

[If an executor assents to a special legacy, and the legatee brings *trover*, and recovers large damages; the verdict and judgment is a good bar to a bill by executor to set them aside. *Williams v. Lee, T. 1745, 3 Atkyns, 223.*]

[A plea of a foreign sentence in a commissary court in France (the *bureau des actions*) is bad. *Gage v. Bulkeley, H. 1744, 3 Atkyns, 215.*]

And it need not aver, that the former suit is depending; for it shall be referred, and if set down to be argued, is admitted. 1 *Ver. 332.*

[If parties have agreed to make a submission to an award, a rule of court, and to be restrained from bringing a bill in equity, arbitrators may plead in bar the award, tho' it should be defective in point of law. *Lingood v. Croucher, T. 1742, 2 Atkyns, 395.*]

[If a bill is brought against an arbitrator, for discovery of the grounds of his award, he may plead he is not obliged to set them forth. *Anon, T. 1748, 3 Atkyns, 644.*]

[An award (unless there is collusion of gross misbehaviour) is a good plea to the discovery as well as to the merits. *Tittenfson v. Peat, T. 1747, 3 Atkyns, 529.*]

[If a plea of an award is allowed to a bill, praying a general account, yet the plaintiff is not precluded at the hearing, from objecting to the award for fraud or partiality in the arbitrators. *Lingood v. Eade, M. 1742, 2 Atkyns, 501.*]

[If one partner brings bill for discovery and relief, against another, who pleads that by their articles, all differences relating to their partnership should be referred, that the bill relates to such only, that they have not been submitted, nor has plaintiff offered, tho' defendant has been always ready, &c. this is not good, for there should have been a clause empowering arbitrators to examine parties and witnesses on oath, which by this they cannot do. *Wellington v. Mackintosh, P. 1743, 2 Atkyns, 569.*]

[But it is said that with respect to this point, *Ld. Hardwicke's* opinion must be misreported, for the parties could not give arbitrators such a power. *D. per Kenyon, Master of the Rolls. 2 Brown. Ch. Rep. 337.*]

[And therefore, that by articles of partnership, all differences which might arise were to be referred to arbitration, and that the matters in dispute had not yet been so referred, is a good plea to a bill for an account of a partnership. *Id. ibid. 336.*]

[But to bill of discovery in aid of an action of covenant plea, a clause in the articles, that in case of dispute, it should be referred, was over-ruled by Lord *Loughborough* C.; for whether the effect of the covenant be to bar the action, it is for the court of law to determine. The discovery in equity is of course. *Mitchell v. Harris, 2 Ves. jun. 129.*]

So, a defendant shall plead *the statute of limitations*. *Vide Pract. Reg. in Chan. 279.*

[As at law the *statute of limitations* must be pleaded, so length of time in equity. *Edsell v. Buchanan*, 2 *Ves. jun.* 83. 4 *Bro. Ch. Ca.* 254. *S. C.*]

[Where defendant has been in possession of estate *pur auter vie* for 30 years, the *statute of limitations* is a good plea, tho' plaintiff had not the lease in his possession, and the defendant sets out that the lease had been renewed. *Low v. Burron*, *P.* 1734, 3 *P. W.* 262.]

[The *statute of limitations* is a good plea (but not a good demurrer) to a bill to redeem after the mortgagee has been in possession, many (as 30) years. *Aggas v. Pickerill*, *T.* 1745, 3 *Atkyns*, 225. *Vid.* 2 *Ves. jun.* 83.]

[Intestate dies abroad, leaving infant son; administration is granted during the minority to *A.* who does not sue, the son administrator *de bonis non*, within six years of coming of age, sues, yet the *statute of limitations* may be pleaded against him. *Wych v. East India Company*, *T.* 1734, 3 *P. W.* 309.]

[A corporation may plead the *statute of limitations*, as well as private persons. *Ibid.*]

[The *statute of limitations* may be pleaded, tho' an original has been filed, if there have been no proceedings on it for six years. *Lacon v. Lacon*, *T.* 1742, 2 *Atkyns*, 395.]

[To a note to pay an annuity, or a sum three years after date, or a sum by instalments, the plea must not be, did not promise, but that the cause of action did not accrue within six years. *Anon. H.* 1743, 3 *Atkyns*, 70.]

[Plenary for six months is a good plea to a bill, praying that defendant, who was presented by a trustee in breach of trust, may be compelled to resign. *Boteler v. Allington*, *H.* 1746, 3 *Atkyns*, 453.]

[The *statute of limitations* is no plea where the bill charges fraud, but it should charge that the fraud was discovered within six years before bringing the bill. *S. S. Company v. Wymondsell*, *M.* 1732, 3 *P. W.* 143.]

The *statute of limitations* cannot be pleaded to the discovery when the debt was due, tho' it may be to the debt itself. *Mackworth v. Clifton*, *T.* 1740, 2 *Atkyns*, 51.

[A fine and non-claim is not a good bar to a plaintiff's title, if a suit has been pending in this court, in a case where there is proper matter of equity. *Baker v. Pritchard*, *T.* 1742, 2 *Atkyns*, 387.]

[If a man enters upon an estate on the footing of a trustee, and performs the trusts, but never makes any declaration of it, and then levies a fine, a plea of this fine and non-claim shall not be allowed to bar a remainder-man. *Shields v. Atkyns*, *T.* 1747, 3 *Atkyns*, 560.]

[The *statute of limitations* cannot be pleaded to a bill for discovery of a title, and charging fraud, but defendant must answer to the fraud. *Bicknell v. Gough*, *T.* 1747, 3 *Atkyns*, 558.]

[So, the defendant may plead] the privilege of the university to have consueance of pleas. *Ca. Ch.* 237. *Vide* 2 *Vent.* 362.

That the bill requires an answer to a matter, which subjects the defendant to a penalty, or accuses him of a crime. 1 *Ver.* 109.

[If a discovery is prayed of a contract to purchase an estate devised

vised to the vendor, against whom there has been a verdict, and a receiver put in possession by *Chancery*, to both which this contract was subsequent, it is within *st. 32 H. 8. c. 9.* against selling pretended titles, which statute defendant may plead. *Sharp v. Carter, T. 1735, 3 P. W. 375.*]

[If a bill is brought for relief against a policy of insurance, suggesting the ship was fraudulently lost, and that she had only wool on board, and interrogating what goods were on board, defendant may plead the statutes making exportation of wool penal; but if any other kind of goods are mentioned in the charging part, defendant must give some answer to that. *Duncaif v. Blake, H. 1737, 1 Atkyns, 52.*]

If a plea of the statute of frauds, as to a discovery, is coupled with an answer admitting the facts, the plea must be over-ruled. *Cottingham v. Fletcher, H. 1740, 2 Atkyns, 155.*]

So, if the bill be for a redemption, upon a suggestion, *that A. conveyed to the father of the defendant in mortgage, who agreed to make a defeasance; a plea, that the land was settled in marriage on the defendant, for a consideration paid, without notice of such agreement, is good. R. Ch. R. 9.*

[If to a bill by a creditor under a will, for sale of lands for payment of debts, for discovery of title of lands in widow's possession, she pleads a deed of settlement and jointure, and offers to discover if plaintiff will confirm, it is bad, unless she set forth the particular lands, and the date of the deed. *Chamberlain v. Knapp, H. 1735, 1 Atkyns, 52.*]

So, a defendant shall plead to a bill for discovery of a title, *that he is a purchaser for a valuable consideration, without notice of the plaintiff's incumbrance. 2 Vent. 361. Vide post. (413, 4.)*

And need not shew for what consideration. *R. Ca. Ch. 34. R. Hard. 510.*

[A valuable consideration set forth by defendant, protects him from giving an answer to a title set up by plaintiff; but plea of bare title, without setting forth a consideration, will not. *Brereton v. Gamul, H. 1741, 2 Atkyns, 240.*]

So, it need not mention the time of the purchase. *R. Hard. 510.*

But if the plea does not add, *that he was a purchaser without notice,* it is bad. *R. 2 Vent. 361. Semb. 1 Ver. 179.*

[To a bill for discovery of defendant's title, it is a good plea, that a writ of right had been tried and determined against the plaintiff, who was demandant in the writ of right. *1 Brown. Ch. Rep. 305.*]

[But where the bill is for a discovery leading to relief at law, the defendant cannot plead in bar to the discovery, matter which would be a bar to the legal remedy. *2 Brown. Ch. Rep. 11.*]

[In a plea of a purchase, if defendant say he had no notice at the time of the purchase, he need not say he had it not at any time before. *Jones v. Thomas, H. 1733, 3 P. W. 243.*]

And without notice at the time of the purchase, is not sufficient without saying, *that he had no notice when the conveyance was executed. R. Ca. Ch. 34.*

[If a purchase for valuable consideration without notice, is pleaded to a bill, which charges particular and special notice, a general denial of notice is not sufficient; it must deny as specially, or it will be bad. *Radford v. Wilson*, M. 1754, 3 *Atkyns*, 815.]

[If to a bill for possession, defendant pleads purchase for valuable consideration, and that the money is paid, or *bonâ fide secured to be paid*, and it is in fact only secured; the plea shall be over-ruled, for he has now notice of plaintiff's title. *Hardington v. Nickolls*, H. 1745, 3 *Atkyns*, 304.]

And notice shall be by way of answer, not by plea. R. 2 *Ca. Ch.* 161.

[If defendant in plea of purchase for valuable consideration omits to deny notice, and plaintiff replies, defendant need only prove his plea, for plaintiff might have set it down to be argued. *Harris v. Ingledew*, H. 1730, 3 *P. W.* 91.]

[In pleading a purchase of mortgage, the defendant must shew that the vendor or mortgagor pretended to be seised in fee. *Head v. Egerton*, P. 1734, 3 *P. W.* 280.]

[On a plea of a purchase for a valuable consideration without notice of plaintiff's title, it is sufficient to aver, that the person who conveyed was seised, or pretended to be seised, when he executed the purchase deeds; but where fine and non-claim is the bar, the averment must be that he was actually seised; seised *ut de libero tenemento* is sufficient. *Story v. Ld. Windsor*, T. 1743, 2 *Atkyns*, 630.]

So, if a defendant pleads *a settlement after marriage, pursuant to an agreement before*, the plea ought to shew what the agreement was. 1 *Ver.* 139.

If the defendant pleads, *that he is a purchaser, bonâ fide, without notice, and denies the fraud alleged in the bill*, it is not good, unless he answers to the fraud. 1 *Ver.* 185.

If he does not shew the vendor seised and possessed, it is bad. 1 *Ver.* 246.

If he pleads it to more than was settled for what is then due, it will be bad. *Vide Ch. R.* 143.

[If under one roof there was formerly a fulling-mill and a corn-mill, which paid a *modus* of 6s. 8d., and the fulling wheels are taken away, and two corn mills are put in its place, and a bill is brought for tythe of three mills, and the *modus* is pleaded for the one mill, it is bad in form and in substance. *Talbot v. May*, M. 1743, 3 *Atkyns*, 17.]

So, to a bill by an executor, for an account of the profits of an estate *pur autre vie*, the defendant may plead, *that the testator permitted him to take the profits for a debt upon which he entred, and the testator being dead, has title as occupant.* R. 2 *Vent.* 364.

So, to a bill for a discovery, the defendant shall plead, *that what he knew was only as counsel, arbitrator, &c.* R. *Ca. Ch.* 277.

So, the defendant may plead, *that he being a mortgagee, upon hearing of prior incumbrances, purchased an estate prior to the plaintiff's, with an offer to assign, on payment of the money due upon both.* R. *Ca. Ch.* 150. *Vide post.* (4 A 10.)

So, if a mortgagee takes a prior estate in fee, he shall not be obliged to make discovery. *D. Hard.* 173.

Otherwise, where he purchases other incumbrances. R. *Hard.* 172. S 4 So,

So, for a defendant to a bill for discovery of the goods of a bankrupt, it shall be a good plea, *that he purchased them bonâ fide, for a valuable consideration, before a commission, and before notice of the bankruptcy.* R. 1 Ver. 27.

[Plea of a stated account must shew it was in writing, and what the balance was. *Burk v. Brown, T. 1742, 2 Atkyns, 397.*]

[A plea of a stated account, as to all matters *hereinbefore accounted for*, is bad; it should aver, that it is just and true to the best of defendant's knowledge and belief. *Anon. H. 1743, 3 Atkyns, 70.*]

[If a bill impeaches an account, and charges that plaintiff has no counterpart of it, defendant, if he pleads a stated account, must annex a copy of it. *Hankey v. Simpson, H. 1745, 3 Atkyns, 303.*]

But to a bill to be relieved from a bond for the balance of an account, a plea, *that the account was stated with his testator, and the vouchers delivered up, and a bond given for the balance*, was over-ruled. *Ca. Ch. 262. Vide post. (2 A 3.)*

Bill for an injunction to an action for waste, because the waste alleged was an improvement; plea of the *statute of Gloucester*, which allows an action for waste against the lessee, was over-ruled. *Ch. R. 135.*

Bill for money secured by mortgage, and also by bond; plea, *that the plaintiff, in an action at law upon the same bond, was nonsuited*, is not good. *Vide 1 Ver. 77, 8.*

Bill for relief against a policy, to pay without abatement, if A. died before M.; plea, *that A. did die before*, over-ruled. R. 2 Ver. 10.

Bill to be relieved against a verdict at law; plea *of the verdict and judgment, and that the matter is confusable at law, and the plaintiff did there insist upon it*, over-ruled. R. 2 Ver. 146. 155.

[If a bill is brought to set aside a will for fraud, and for a receiver, and defendant pleads that the will was duly executed, and ought to prevail till found otherwise at law, and therefore no receiver should be appointed till then, the plea is good as to the first part, but not as to the latter. *Anon. M. 1743, 3 Atkyns, 17.*]

Bill for an account of goods sold by the sheriff upon an execution at an under-value; plea, *that they were offered to the plaintiff at the same value*, is good. R. Ch. R. 111.

[If a bill is brought against administrator for a distribution, it is not a good plea that he is not obliged to it within the year; but it shall stand for answer with liberty to except. *Hart v. King, in Sc. T. 1720, Bunb. 64.*]

[If the plea is to discovery and relief, when the bill prays only a discovery, it is bad. *Asgil v. Dawson, in Sc. H. 1720, Bunb. 70.*]

[A plea may be bad in part, yet not bad in the whole. *Duncalf v. Blake, H. 1737, 1 Atkyns, 52.*]

[A bill, so far as not contradicted by the plea, must be taken to be true. *Plunket v. Penfon, T. 1740, 2 Atkyns, 51.*]

[If a bill is brought for payment of a note of an intestate, charging that administrator promised to pay as soon as he got in the effects, a plea that defendant made no promise to pay, is bad, as too general; it should be, no promise to pay out of the assets. *Anon. H. 1743, 3 Atkyns, 79.*]

[If a plea is to the relief only, and is directed to stand for an answer, the words, *with liberty to except*, must be added, or it is allowing

giving it a good answer. *Maitland v. Wilson*, M. 1754, 3 Atkyns, 814.]

[A plea containing exception of matters hereinafter mentioned is bad. *Salkeld v. Science*, M. 1750, 2 Vesey, 107.]

[So, to a bill for account and discovery, a plea of release, farther and other than in the plea set forth. *Ibid.*]

[Unless the only sums mentioned in the plea are also mentioned in the release, for that makes it the same, as if it had been said, *farther than is in the release*, which is good in form. *Ibid.*]

[But if there are charges of account made up, and dealings which require answer and discovery, such plea of release is bad in substance; for if allowed, plaintiff could not except. *Ibid.*]

[If defendant does not prove the fact, necessary to support the plea, plaintiff shall not lose his discovery, but the court will order examination on interrogatories to supply it. *Brownfaword v. Edwards*, H. 1750, 2 Vesey, 243.]

[A plea may be amended, if there be a mere slip, where the material ground of defence appears sufficient, but not otherwise. 2 Bro. Ch. Rep. 147.]

[Plea to discovery, that it may subject the defendant to penalties of a statute; and also of articles of impeachment exhibited against him by the Commons of Great Britain, is double, inconsistent, and bad. *Nobkissen v. Hastings*, 2 Ves. jun. 84. 4 Bro. Ch. Ca. 253. S. C.]

[A double plea not allowable in the court of Chancery. *Semb.* 2 Ves. jun. 86.]

[Not usual to refuse leave to amend a plea; but the defendant must be tied down to a very short time: where it seemed incapable of amendment, he had leave to withdraw it, and plead *de novo* in a fortnight. *Ibid.* 87.]

[Plea over-ruled on a ground of form: defendant pleaded the same matter again more formally: this held to be irregular, and that he must now insist on his defence by way of answer. By *McDonald* C. B.; the other Barons *dub.* *Freeland v. Johnson*, Anstr. 407.]

[A mere agreement to refer to arbitration, without an actual reference, and without a covenant that there should be no suit at law or in equity, cannot exclude the jurisdiction of any court. *Mitchell v. Harris*, 2 Ves. jun. 129.]

[Bill for discovery of deeds relative to plaintiff's title, and to restrain proceedings in ejectment, and charging constructive notice in the party under whom the defendant claims; he pleads purchase for a valuable consideration, and that to his knowledge and belief there was no notice; held, he must answer the facts on which the court is to put the construction. *Jerard v. Sanders*, 2 Ves. jun. 187. 4 Bro. Ch. Ca. 322. S. C.]

[Plea of a fine over-ruled, because no seisin was stated. *Page v. Lever*, 2 Ves. jun. 450.]

[Plea to bill of discovery in support of an action under the *stat.* 9 Ann. c. 14. for money lost at play by the assignees of the loser, a bankrupt, that the action was not commenced, and the bill exhibited within three months over-ruled. *Brandon v. Sands*, 2 Ves. jun. 514.]

[Plaintiffs having brought an action against defendant to recover payments made for insuring lottery tickets, by their bill prayed a discovery and account, offering to allow payments made by the defendant.

ant. Demurrer to the bill over-ruled. *Brandon v. Johnson*, 2 *Ves. jun.* 517.]

[Bill by annuitant under a will for an account of arrears against two administrators, with the will annexed; one pleaded the *statute of limitations* to so much of the bill as sought satisfaction for the arrears, or for so much as was stated to have accrued due previous to six years before the bill; he also by answer set up an agreement to relinquish the annuity: plea over-ruled without prejudice to insisting on the same matter by answer. *Higgins v. Crawfurd*, 2 *Ves. jun.* 571.]

[Plea, 40 years possession of defendant without account, or admission of any debt, to a bill setting up an old mortgage, and stating an account settled; and that owing to infancy, coverture, and other disabilities, plaintiffs could not proceed: plea allowed. *Blewitt v. Thomas*, 2 *Ves. jun.* 669.]

[Plea of alien enemy is good to a bill of discovery. *Daubigny v. Davallon*, 2 *Anstr.* 462.]

[Such plea, stating this nation to be at war with the government of France, and that the plaintiffs are *Frenchmen, aliens, and enemies* to the king, is sufficient. *Ibid.*]

[Bill by one partner against another, stating an award which had not provided for the event of the partnership funds proving deficient, and the plaintiff's being compelled to make up the deficiency, and that plaintiff was so compelled. It therefore called on the defendant for contribution, and an account of the debts and effects of the partnership. Plea, the award. The court thought that the award should be considered as final, since specific payments by the plaintiff to creditors had not been stated, and allowed the plea. *Routh v. Peach*, 2 *Anstr.* 519. 3 *Anstr.* 637.]

[In *Exchequer*, plea of outlawry ought to be set down for argument by defendant. *Chapman v. Lansdown*, 2 *Anstr.* 554.]

[To a charge in the bill, that *A.* died seised in fee of estates in *Derbyshire* and elsewhere; plea of fine of all the estates charged in the bill, and of all the estates of which *A.* died seised in fee, sufficient, without averring, that they were in *Derbyshire*, and none elsewhere: the court will not intend, that there are advowsons merely because they are mentioned in the fine. *Butler v. Every*, 1 *Ves. jun.* 136. 3 *Bro. Ch. Ca.* 80. S. C.]

[Bill by Nabob of the *Carnatic* against the *East India Company* for discovery, and account of rents and profits of his territories while in their possession as security for debt, and for the balance, submitting to pay it if against him. Plea, that by divers charters, &c. and statutes confirming them, defendants have sole privilege of trading to *India*, and a right to send men, ships, &c. and to commission officers to continue, or make peace and war, &c. for their advantage, with any natives not Christians; that plaintiff is a native sovereign, not a Christian; that all the transactions in the bill passed between him as such sovereign and defendants in exercise of their privileges; and related to matters transacted between them with regard to peace and war, and security and defence of their respective possessions; and therefore not cognizable in this, or any municipal court. Plea over-ruled; and having been once amended, farther time refused; and defendants compelled to answer immediately. *Nabob of the Carnatic v. the East India Company*, 1 *Ves. jun.* 371. 3 *Bro. Ch. Ca.* 292.]

[Plea to jurisdiction must shew another: plea to jurisdiction of all courts absurd, because the same as plea in bar. 1 *Ves. jun.* 371.]

[Plea must tender issuable matter. *Ibid.* 393.]

[Amendments moved ought properly to be stated. 1 *Ves. jun.* 388.]

[Plea of the *statute of Frauds* a good defence to a parol variation of an agreement for a lease, not if it amounts only to waiver of part, or to a declaration of trust. *Jordan v. Sawkins*, 1 *Ves. jun.* 402. 3 *Bro. Ch. Ca.* 402. S. C.]

[Plea of another suit depending for the same cause referred to the master of course without being set down. *Anon.* 1 *Ves. jun.* 484. 3 *Bro. Ch. Ca.* 544.]

(I 2.) How put into Court, &c.

A plea may be put in upon a general *dedimus*.

Or, under the hand of counsel only, if it be to the jurisdiction, or to the disability of the plaintiff. *Ord. per Cla. Rules and Orders of Chancery*, 96.

The plea shall be put in upon oath of the defendant. 2 *Ca. Ch.* 208.

But if the matter of the plea appears upon record, it is not necessary; and therefore a plea of outlawry shall be without oath. *Ca. Ch.* 237. *Vide Pract. Reg. in Chan.* 274.

After an attachment with proclamation, no plea shall be received without an order of court. *Ord. per Cla. Rules and Orders of Chancery*, 99. *Vide Pract. Reg. in Chan.* 274, 5.

Privilege of the university to have conuſance of pleas shall be pleaded without oath. *Ca. Ch.* 237.

So, a plea must be averred; otherwise it will be over-ruled in the *Exchequer*. *Hard.* 160.

So, a dilatory plea shall not be allowed, where the defendant is in contempt, or answers by commission.

So, a defendant who pleads ought to answer to a fact, not covered by the plea, or which supports his plea. *Eq. Ca.* 185.

[If at hearing the cause, defendant has not supported his plea by his answer, plaintiff may counterprove by reading the answer, and so overturn the plea: so, at the time of arguing the plea, plaintiff may counterprove by reading the answer to shew defendant has not sufficiently supported his plea. *Hildyard v. Cressy*, *H.* 1745, 3 *Atkyns*, 303.]

All pleas to the jurisdiction, or upon the substance of the bill, shall be determined in court. *Ord. per Cla. Rules and Orders of Chancery*, 97. *Vide Pract. Reg. in Chan.* 282.

A plea to the jurisdiction, or founded upon the substance of the bill, shall be entred by the defendant with the register, within eight days, to be argued. *Ord. per Cla. Rules and Orders of Chancery*, 97.

A plea to the disability, the plaintiff within eight days after filing shall enter with the register to be argued, if he thinks it proper; and if he does not do it, the defendant of course shall take out process for five marks costs. *Ord. per Cla. Rules and Orders of Chancery*, 98. *Vide Pract. Reg. in Chan.* 277.

A plea

A plea of another suit depending, shall be referred to a master; and if the plaintiff does not procure his report within one month, his bill shall be dismissed with seven nobles for costs. *Ord. per Cla. Rules and Orders of Chancery, 98. Vide Pract. Reg. in Chan. 281.*

If the report be against the plaintiff, he shall pay five pounds for costs. *Ibid.*

If a plea be allowed upon the arguing, the ordinary costs against the plaintiff are five marks. *Ord. per Cla. Vide Rules and Orders of Chancery, 98.*

But if the plea comes in upon a *dedimus*, tho' it be good, the defendant shall not have costs. *Ord. per Cla. Rules and Orders of Chancery, 96. Vide Pract. Reg. in Chan. 134.*

If the defendant does not procure his plea to the jurisdiction, or upon the substance of the bill, to be entred with the register within eight days, it shall be disallowed of course, as for delay; and the plaintiff shall take out process for other answer, and 40 s. costs. *Ord. per Cla. Rules and Orders of Chancery, 97.*

And such plea shall not be afterwards debated without the order of the court, upon motion. *Ibid.*

If the plea be over-ruled upon the arguing, the defendant shall pay five marks costs. *Ord. per Cla. Rules and Orders of Chancery, 96.*

But the court may order, that the defendant shall not pay costs. *Ca. Ch. 41.*

Or, that the plea be over-ruled, but that the plaintiff shall not proceed farther than answer, without leave of the court. *Ca. Ch. 262.*

Or, that the defendants do answer, and their plea to be considered at the hearing of the cause. *Ca. Ch. 13.*

So, by order in the *Exchequer*, if the plea or demurrer be not set down by the defendant by the *Saturday* se'nnight after it is put in, or be over-ruled, it shall be disallowed, and the defendant shall pay 40 s. costs, and after his answer shall rejoin *gratis*, and join in commission. *Rules and Orders in Exchequer, 4. Rule 9.*

If a plea in *Chancery* be not set down, but the plaintiff replies, and the defendant joins in commission, and the cause is heard, the plea is waived. *Abr. Ca. 41.*

If the plaintiff does not set down the plea, nor the defendant, but the plaintiff replies to it generally, he admits the plea good, if the fact be true. *1 Ver. 72. [Anon. M. 18 G. 2. Wilf. 82.]*

If the plea be in abatement, and disallowed, there shall be a *respondeas ouster*. *1 Ver. 73.*

If in bar, be it allowed or disallowed, it shall be peremptory. *1 Ver. 73.*

Or, there may be an order, that it shall stand for an answer, saving just exceptions, upon which the plaintiff shall reply, and the defendant shall prove the fact of the plea. *Vide Pract. Reg. in Chan. 283.*

[If defendant pleads and dies before plea argued, it cannot be argued, but his representative must plead *de novo*. *Micklethwaite v. Calverley, M. 7 G. 2. C. T. T. 3.*]

(K) Answer.

(K 1.) When it shall be filed.

IF the defendant does not demur or plead, he shall answer to the bill. [But where he has answered all the circumstances respecting his own interest, he shall not be compelled to answer the further circumstances of the bill. 2 *Brown. Ch. Rep.* 332.]

If the plaintiff give a rule to the defendant upon the day after costs day to make answer, the defendant shall answer within seven days afterwards. *Vide Pract. Reg. in Chan.* 8.

Otherwise he shall have time to answer till the end of the term. *Vide Pract. Reg. in Chan.* 9.

And if the *subpoena* was returned upon the last return in term, till the beginning of the next term. *Ibid.*

But if it was returned at any other return than the last, the defendant shall answer within seven days, tho' there be not so many within the term, for the *Chancery* is always open, and tho' no rule be given. *Ibid.*

So, if it be returned on a day certain, tho' it be the last day in the term.

Or if it be returnable *immediate*, tho' served on the last day of term.

Yet if the defendant takes out a commission, for the taking of his answer in the country, as he may of course, he shall have time till the day after the first costs day in the next term; or in *Trinity* term, till the day after the second costs day. *Vide Pract. Reg. in Chan.* 10.]

So, he may have longer time, upon motion and *affidavit*, that he cannot answer without a sight of writings, which are twenty miles distant in the country. *Vide Pract. Reg. in Chan.* 9.

Or, without conference with others concerned. *Ibid.*

But if he have time granted him to answer, when he is in contempt; the process for contempt proceeds without a special order. 1 *Ver.* 104.

[Defendant in contempt may have leave to plead, answer, and demur. *Town of Scarborough v. Jackson*, P. 1728, *Bunb.* 251.]

[If defendant in contempt prays time to answer, he shall enter his appearance. *Ibid.* *Lord Berkeley v. Verden*, M. 1730, *Bunb.* 290.]

[And he shall be deemed in contempt, if the time for answering be out, tho' no attachment sealed. *Ibid.*]

By order in the *Exchequer*, every defendant shall file his answer in eight days after appearance, if the bill was filed in term, or within two days after, if he does not pray a commission (by entry under his appearance) returnable the next term. *Vide Rules and Orders in Exchequer*, 3. Rule 6.

If he lives fifteen miles distant from *London*, and the appearance be upon the first return of *Easter* or *Michaelmas* term, the commission shall be returned before the end of the term. *Ibid.*

[By the course of the court, a plaintiff in a cross cause cannot have an answer till he has himself answered the original bill. 2 *Atk.* 218.]

[If plaintiff in original cause has not taken out process, he cannot compel defendant, who files a cross bill, to answer him first. *Price v. Ld. Coningsby*, H. 1722, *Bunb.* 124.]

[If

[If after an answer is reported insufficient, defendant files cross bill, and plaintiff amends, and obtains orders to answer amendments when exceptions are answered, he waives his priority; for the pendency of the suit, as to the amended parts, is only from the time of the amendment. *Long v. Burton*, M. 1741, 2 *Atkyns*, 218.]

[If *A.* files bill against *B.*, whose plea is allowed; and *B.* files cross bill against *A.*, whose answer is reported insufficient; *A.* loses his priority of suit, and shall make good answer to *B.* before *B.* answers an amended bill of *A.* *Rattray v. Darley*, H. 1750, 3 *Atkyns*, 724.]

[If on motion for time to answer obtained, the defendant put in a plea, that is a sufficient compliance with the order. 1 *Brown. Ch. Rep.* 56.]

(K 2.) How it shall be made.

The answer ought to be under the hand of counsel, who ought first to peruse it. *Vide Pract. Reg. in Chan.* 6. *Vide Rules and Orders of Chancery*, 93.

[But where the counsel's name to an answer had been forged, the court of *Exchequer* would not order the answer to be taken off the file, lest an innocent plaintiff should suffer by it. *Bull v. Griffin*, 2 *Anstr.* 563.]

[Defendant stating himself trustee for mortgagees, not naming them, so as to enable plaintiff to amend, decreed to deliver up deeds with costs. *Earl of Scarborough v. Parker*, 1 *Ves. jun.* 267.]

[Defendant to bill for discovery, and account, objecting by answer that he had no concern in the business, must answer fully, tho' a plea to that effect would bar both discovery and relief. *Cartwright v. Hateley*, 1 *Ves. jun.* 292.]

[An agent, charged with personal fraud, cannot, by disclaiming interest, avoid answering fully. *Bulkeley v. Dunbar*, 1 *Anstr.* 37.]

[Where a discovery is sought of a correspondence, if the defendants set forth *extracts of letters*, and swear that those are the only parts of the correspondence on the subject inquired into, it is sufficient. *Campbell v. French*, 1 *Anstr.* 58.]

[So, when a party refers to extracts from books of accounts, those parts which he states to be immaterial, are left sealed up. *Ibid.* 59.]

[Defendant, a trustee in a will, who released, and never acted, not bound to answer allegations of fraud in obtaining the will, and not being interested, he might be examined as a witness. *Richardson v. Hulbert*, 1 *Anstr.* 65.]

[Where the bill is amended after answer, by adding a defendant, the original defendant has no right to answer the amended bill, and an order for time for that purpose is a mere nullity. *Gill v. Matthews*, 3 *Anstr.* 879.]

[The answer need not set forth an account, where the ground on which it is prayed is denied. *Marquis of Donnegal v. Stewart*, 3 *Ves. jun.* 446.]

[A schedule to an answer, containing at length a bill of costs, and observations with reference to a bill formerly delivered for the same business, held impertinent, tho' the bill called on the defendant to set forth how he computed and made out his demand, with all the particulars relating thereto, with interrogatories pointed to the several

several items, and to a minute comparison of the two bills. *Alfager v. Johnson*, 4 *Ves. jun.* 217.]

[Defendant, who is in fact only a witness, if he answers, must answer fully, tho' he might have pleaded. *Cartwright v. Hateley*, 3 *Bro. C. C.* 238. *Shepherd v. Roberts*, *ibid.* 239. *S. P.*]

[By a general order, 27 April 1748, all answers shall be signed by the parties swearing them, in the presence of the master or of the commissioners taking them.]

It shall be succinct, and not scandalous. *Vide Pract. Reg. in Chan.* 6. *Vide Rules and Orders of Chancery*, 93.

It must confess, avoid, deny, or traverse all the material parts of the bill. *Vide Pract. Reg. in Chan.* 6.

[If a bill is brought for discovery only, to which defendant pleads fine and non-claim, and the bill is amended, praying relief, defendant cannot put in a complete answer over again, for it might be referred for impertinence, but he must refer to the former answer; and this last answer is to be considered as a part of the answer to the original bill. *Hildyard v. Cressy*, *H.* 1745, 3 *Atkyns*, 303.]

It must be direct, as to the act of the defendant, charged to be done within seven years, without saying, *To his remembrance*, or *as he believes*, unless the court, upon exception, sees cause to dispense with so positive an answer. *Ord. per Cla. Rules and Orders of Chancery*, 99: *Vide Pract. Reg. in Chan.* 7.

Yet, that he did not receive more, to his remembrance, was allowed. 1 *Ver.* 470.

It must be without evasion: as, the receipt of 100*l.* &c., shall not be answered literally; but the defendant shall say, that he did not receive any part, or that he received so much, and not the residue; for he ought to traverse the substance, viz. the receipt. *Ord. per Cla. Rules and Orders of Chancery*, 100. *Vide Pract. Reg. in Chan.* 8.

So, if a fact be charged with divers circumstances, he shall answer to the fact alleged; and it is not sufficient to deny that he did it, with such circumstances, which is a negative pregnant. *Ibid.*

Bill to make a settlement, and discover incumbrances upon the land to be settled; if the defendant denies the agreement to make a settlement, yet he shall answer to the incumbrances immediately, without answering to the incumbrances upon interrogatories after it is determined, whether he agreed or not. *R. 2 Vent.* 357.

[Tho' a person cannot compel another to set forth by what title, nor under whom he claims, merely because his lands lie next, yet where the dispute is about boundaries or unity of possession, defendant must set forth how he is entitled. *Champernoon v. Borough of Totness*, *M.* 1740, 2 *Atkyns*, 112.]

Bill in the *Exchequer* for tythes, if the defendant by answer, and not by plea, insists upon a discharge by a *modus*, he ought to answer to the quantities and values, and what lands he has, and it shall not be referred to an examination by interrogatories. *R. Hard.* 130.

[If the answer admits plaintiff entitled to all tythes, but of corn and grain, the court will decree him hay, without proving he ever received it. *Fox v. Bardwell*, *P.* 1733, *Bunb.* 327.]

If the bill be against husband and wife, they may answer severally. 2 *Ca. Ch.* 39. 173.

But the answer of the wife is nothing worth, if the husband does not answer. 2 *Ca. Ch.* 173.

And

And if the answer of the wife confesses that which the husband denies, it shall not prejudice the husband: 2 *Ca. Ch.* 39.

[If the husband is run away since appearance, and no friend will be guardian, the wife may have leave to answer without. *Glover v. Young*, P. 10 *G. Bunb.* 167.]

[A husband allowed to answer without his wife, because she declared she would not answer with him, and loved the plaintiff better. *Murriet v. Lyon*, T. 10 *G. Bunb.* 175.]

[If a husband brings a bill against his wife, she shall answer as a *feme-sole*, and not by guardian. *Ex parte Strangersways*, P. 1747, 3 *Atkyns*, 478.]

If a bill is brought against a Jew, he shall be sworn upon the *Pentateuch* in the presence of the plaintiff's clerk. 1 *Ver.* 263.

[Defendant put in his answer on affirmation, as being a quaker. The court will not inquire whether he is one, for he would be precluded from denying that fact, on an indictment for perjury in the answer. *Marsb v. Robinson*, 2 *Anstr.* 479.]

A defendant being surprised in his answer, before replication, upon a certificate, and an *affidavit* of notice shall be allowed to amend the mistake. *Ca. Ch.* 29.

[An answer may be amended before issue joined. *Mullins v. Simmonds*, H. 1724, *Bunb.* 186.]

[An answer was amended (by making a greater quantity of acres) after issue joined, and a commission issued, on defendant's paying all costs, and taking a new commission at his own expence. *Berney v. Chambers*, H. 1727, *Bunb.* 248.]

[Answer refused to be amended, (by altering the day of payment of a *modus*), tho' issue not joined, and the day set right in a cross bill. *Wortley Montague's Case*, *ibid.*]

[An answer amended by the draught, where the mistake was 250 or 300, for 25 or 30. *Bishop of Ely v. James*, H. 1730, *Bunb.* 295.]

[But refused to amend 86 for 68, where the draught and ingrossment agreed. *Ibid.* *Vid. Harris v. Daubeny*, 3 *Anstr.* 717.]

[If attorney-general has put in the common answer to a bill of interpleader, (that he is a stranger, and hopes the interest of the crown will be taken care of, &c.) he may withdraw it, (on motion,) and put in another, insisting on the particular right of the crown. *Erington v. Attorney-General et al.* P. 1731, *Bunb.* 303.]

[Answer may be amended, if for plaintiff's benefit, and defendant very old. *Holliday v. Nabb*, M. 1732, *Bunb.* 323.]

[A defendant, on particular circumstances may have leave to amend an answer by adding a new fact; as, if the answer refers to a deed, to amend by adding that by the custom of the country where it was executed, it was deposited, so that an authentic copy is all that can be had. *Wharton v. Wharton*, P. 1740, 2 *Atkyns*, 294.]

[The court will not allow a defendant to amend an answer, by striking out the admission of a fact which would deprive plaintiff of the benefit of this evidence; especially if he does not swear he was surprised into the admission, or ill-advised in setting it forth. *Pearce v. Grove*, T. 1747, 3 *Atkyns*, 522.]

[Nor, shall an answer be amended after an indictment for perjury preferred, or threatened, in order to avoid the indictment. 1 *Brown. Ch. Rep.* 419.]

[Nor,

[Nor, after replication put in, on affidavit that defendant was informed, and believed that he had a good defence, (*viz.*) a *modus*, and had not inserted it in his answer, not being then able to set it forth with precision. Motion refused with costs. The practice is to allow a supplemental answer, but that only where new matter arises, or a sufficient reason is given for its not being inserted in the first answer, *Tennant v. Wilsmore*, 2 *Anstr.* 362.]

So, after a compromise of the cause, the bill and answer may, by consent, be ordered to be taken off the file. 1 *Ver.* 189.

[Motion for leave to answer by guardian, must name one. *Brassington v. Brassington*, *Anstr.* 369.]

[In a suit for an account of tithes, the defendant cannot pay money into court before answer. *Hall v. Matthews*, *Anstr.* 444.]

(K 3.) Answer by Commission.

The defendant may take out a commission to take his answer in the country, of course, without motion or affidavit; *vide* the form, *West. f. 27. Vide Pract. Reg. in Chan.* 72.

And it was usual to inclose a copy of the bill in the commission. *Vide. Pract. Reg. in Chan.* 72.

But now, by the *st. 4 & 5 Ann.* 16. no copy, abstract, or tenor of any bill in equity shall go with the *dedimus*, or commission for taking the defendant's answer, and in lieu of it, the sworn clerks, in all causes, shall take to their own use the whole term fee of 3*s.* 4*d.* and the whole fee for all small writs made by them.

But a commission shall not be allowed, after an attachment with proclamation returned, without motion upon an affidavit, that the defendant is sick, or other special cause; or without the assent of the plaintiff. *Vide Pract. Reg. in Chan.* 75, 6.

Nor, after time allowed for taking the answer by reason of the absence of writings, &c.

Nor, after an answer formerly taken upon commission. *Ord. per Cla. Vide Rules and Orders of Chancery*, 99. *Vide Pract. Reg. in Chan.* 77.

And by an order in the *Exchequer*, a defendant who answers by commission shall not demur, or give a dilatory plea, without order of court upon motion. *Rules and Orders in Exchequer*, 4. *Rule 7.*

So, if the defendant prays a commission, and does not take it out until three weeks before the next term, (other than *Trinity* term,) the plaintiff may take out process of contempt. *Ibid.* *Rule 6.*

The commissioners must administer the oath to the defendant, and return the commission with the answer signed by the defendant, and the bill (*vide supra*, and 5 *Ann.* 16.) inclosed in the commission, thereunto annexed, and signed by the commissioners in this form, *capt. apud C. in Com. E. 2^o die M. &c. coram nobis*, &c.

[By a general order, *April 27, 1748*, by Lord *Hardwicke*, all answers and pleas, as well those which shall be taken before commissioners in the country, as those which shall be taken before any master of this court, shall be signed by the parties swearing such answers and pleas, in the presence of the master, or of the commissioners before whom the same shall be taken respectively. 2 *Atkyns*, 304.]

[A commission may go to take the answer of a heathen idolator, in the *East Indies*, and shall be to take the oath in the most solemn manner according

cording to the commissioners' discretion, and they shall certify the manner. *Ramkiffenseat v. Baker*, M. 1739, 1 *Atkyns*, 19.]

The commission so returned shall be delivered to a master in Chancery by one of the commissioners; or by some other person, who shall take an oath that he received it from one of the commissioners, and has not since opened it. *Vide Pract. Reg. in Chan.* 79. (which mentions the delivery to be to the fix-clerk, or his deputy.)

If the defendant puts in a plea and answer by commission, and the commissioners return, that *ista respons. capt. fuit*, &c. it shall be rejected, but without costs; for it was the fault of the commissioners. 2 *Ca. Ch.* 208.

If the commission is only to take the answer, the commissioners cannot take a plea or a demurrer. 1 *Ver.* 275.

[If time is given, or a commission to answer, without any more, defendant cannot demur, or plead an answer. *Philips v. Winter*, in *Sc. P.* 1721, *Bunb.* 74.]

But if the commissioners return an answer annexed to the commission, and say, *jurat. secundum tenorem commissionis annex.*, it will be well, tho' *executio hujus commissionis*, &c. be omitted. 1 *Ver.* 41.

After answer, but not before, the defendant may move that the plaintiff may make his election to proceed at law, or in equity; for he ought not to proceed in both. 1 *Ver.* 103.

But he may proceed at law for the recovery of the land in ejectment, and for an account of the profits in equity. 1 *Ver.* 105.

(L) Exceptions.

(L 1.) When delivered, &c.

IF the answer is insufficient, the plaintiff may deliver exceptions in writing to the counsel, who signed the answer, or to the defendant's clerk. *Ord. per Cla. Rules and Orders of Chancery*, 101. *Vide Pract. Reg. in Chan.* 171.

[Exceptions cannot be taken to an infant's answer, for he may amend it when he comes of age. *Gibson v. Cole*, in *Canc. H.* 1733, *Strudwick v. Pargiter*, T. 1734, in *Sc. Bunb.* 338.]

[A *feme-covert* shall not be obliged to answer to what might subject her to a forfeiture, tho' she has not demurred as she ought to have done. *Wrotesley v. Bendish*, H. 1733, 3 *P. W.* 235.]

[If a plea is ordered to stand for an answer, without any mention of liberty to except, plaintiff cannot except. *Sellon v. Lewin*, H. 1733, 3 *P. W.* 239.]

[If there is a demurrer to part, and answer to part, plaintiff cannot except till the demurrer is argued; nor will the court discharge the demurrer on motion, tho' frivolous. *London Assurance v. East India Company*, T. 1734, 3 *P. W.* 326.]

[But if defendant answers as to discovery, and pleads as to relief only, plaintiff may except to any matter of discovery before plea argued, for it plainly is not covered by the plea. 3 *P. W.* 326.]

[When plea or demurrer is over-ruled, if defendant has also answered, he need not put in further answer till after exceptions; but if he only demurred, he must answer without exceptions put in. *Cotes v. Turner*, H. 1722, *Bunb.* 123.]

The exceptions shall be delivered the term in which the answer was filed,

filed, or within eight days after that term. *Ord. per Cla. Rules and Orders of Chancery*, 101. *Vide Pract. Reg. in Chan.* 171.

And if the answer was filed in the vacation, within eight days after the beginning of the next term. *Ibid.*

Or, upon motion, the court will give time to deliver exceptions afterwards. *Ibid.*

[If answer comes in in *Michaelmas* term, and plaintiff does not take exceptions within eight days of *Hilary* term, yet on applying to the court, he is entitled of course to except, provided he does it in two terms, including the term in which he moves; but if he neglects it then, the court will not give leave but upon particular circumstances. *General Order, M. 1743, 3 Atkyns, 19.*]

[Nor, to refer it for impertinence. *Anon. T. 1755, 2 Vesey, 631.*]

In the *Exchequer*, by rule, the exceptions shall be delivered within four days of the term next after the answer, and shall be entred to be heard by the court upon the *Saturday* se'nnight following. *Rules and Orders in Exchequer*, 6. *Rule 14.*

And an answer in the vacation, after setting down of causes, shall be reputed an answer of the term ensuing. *Vide Rules and Orders in Exchequer*, 7. *Rule 14.*

But in *Chancery*, if there is a plea to part, and an answer to part, the plaintiff shall not take exceptions to the answer before the plea is argued. *1 Ver. 344.*

If the defendant, within eight days after the delivery, satisfy the plaintiff that the exceptions are frivolous, he may waive them. *Vide Rules and Orders of Chancery*, 101. *Vide Pract. Reg. in Chan.* 171.

Or, the defendant within the same time may amend his answer, or agree that he will amend it, upon payment of 20*s.* costs. *Ord. per Cla. Rules and Orders of Chancery*, 101. *Vide Pract. Reg. in Chan.* 171. In the *Exchequer*, the defendant may amend two days before the day of hearing, on payment of 20*s.* costs. *Vide Rules and Orders in Exchequer*, 6. *Rule 14.*

If the plaintiff does not waive, nor the defendant amend, the plaintiff shall move the court, that the exceptions may be referred to a master. *Vide Rules and Orders of Chancery*, 101. *Vide Pract. Reg. in Chan.* 171. In the *Exchequer*, they shall set down to be heard by the court on the *Saturday* se'nnight. *Vide Rules and Orders in Exchequer*, 6. *Rule 14.*

If the exceptions are delivered in vacation, the defendant shall have time to amend till the fourth day in the next term, unless he be hastened by the court.

If the master reports the answer good, the plaintiff shall pay 40*s.* costs. *Ord. per Cla. Rules and Orders of Chancery*, 101. *Vide Pract. Reg. in Chan.* 171. So, in the *Exchequer*, if the court allows the answer to be good. *Vide Rules and Orders in the Exchequer*, 7. *Rule 14.*

If he reports it insufficient, the defendant shall pay 40*s.* costs, or if the answer was taken by commission, 50*s.*, and shall make further answer. *Ord. per Cla. Rules and Orders of Chancery*, 102. *Vide Pract. Reg. in Chan.* 172. In the *Exchequer*, if the court adjudges the answer insufficient, the defendant pays 3*l.* costs. *Vide Rules and Orders in Exchequer*, 6. *Rule 14.*

And the plaintiff shall have a *subpœna* for the costs, and the other

answer shall not be received till the costs are paid. *Vide Pract. Reg. in Chan.* 172. In the *Exchequer* the defendant shall give another answer in eight days, (unless he takes out a commission to take his answer,) and shall rejoin *gratis*, and join in commission to examine witnesses. *Vide Rules and Orders in the Exchequer*, 7. Rule 14.

[If defendant answers the exceptions fully, the court will not give leave to add or amend an exception, but plaintiff may amend his bill by varying a word or two, and have an answer to it. *Wickens v. Pratt*, H. 1727, *Bunb.* 246.]

[When exceptions are allowed, plaintiff may of course amend without costs, amending defendant's copy. *Chambers v. Robinson*, T. 10 G. *Bunb.* 169.]

[If on exceptions allowed plaintiff has leave to amend, and defendant puts in further answer before amendment, plaintiff may turn the whole amendment into exceptions to the second answer. *Coulston v. Richardson*, T. 10 G. *Bunb.* 168.]

If the answer be reported insufficient, the defendant shall answer to all the points excepted to, tho' more than the bill contained, unless he excepts to the report. *Ca. Ch.* 60.

[Exceptions to the answer to an amended bill shall be referred to the same master to whom the exceptions to the answer to the original were referred. 1 *Brown. Ch. Rep.* 39.]

If the second answer be reported insufficient in the points excepted to, the defendant shall pay 3*l.* costs. *Ord. per Cla. Rules and Orders of Chancery*, 102. *Vide Pract. Reg. in Chan.* 172.

And the plaintiff, upon motion, shall stay all process against him, for not answering to any cross bill, until eight days after the defendant has made sufficient answer.

And the plaintiff shall proceed with his process for contempt against the defendant, and need not begin with a *subpoena de novo*. *Ca. Ch.* 238. So, in the *Exchequer*. *Vide Rules and Orders in Exchequer*, 7. Rule 16.

If after an answer is reported insufficient, and upon exceptions is held bad by the court, another defendant gives the same answer, it shall be disallowed. 1 *Ver.* 74.

In the *Exchequer*, if the second answer be adjudged insufficient, the defendant shall pay double costs, viz. 6*l.* *Vide Rules and Orders in Exchequer*, 7. Rule 15.

In *Chancery*, if the third answer be reported insufficient, the defendant shall pay 4*l.* for costs. *Ord. per Cla. Rules and Orders of Chancery*, 102. *Vide Pract. Reg. in Chan.* 172. In the *Exchequer* 9*l.* viz. treble costs.

[If exceptions are allowed to two answers in *Scac.* and plaintiff amends, and defendant puts in an insufficient answer to amended bill, he shall pay 9*l.* costs, as upon a third insufficient answer. *Harman v. Immin*, M. 1725, *Bunb.* 203.]

If the fourth answer, he shall pay 5*l.*, and shall be examined upon interrogatories, to the points excepted to, and be committed until he makes a full answer and pays the costs. *Ord. per Cla. Rules and Orders of Chancery*, 102. *Vide Pract. Reg. in Chan.* 172. In the *Exchequer*, he shall pay such costs as the court shall think fit, and shall be committed and examined upon interrogatories. *Vide Rules and Orders in Exchequer*, 7. Rule 15.

But

But in *Chancery*, upon a plea over-ruled, and three insufficient answers, the defendant shall not be committed to be examined upon interrogatories. *Ca. Ch.* 279.

[The court will not give leave to add new interrogatories for examination of defendant, on the examination's being reported insufficient, and that both sets may be answered at the same time, without notice of the motion be given to the other party. *Anon. P.* 1747, 3 *Atkyns*, 511.]

When the defendant is to be examined upon interrogatories, his counsel shall see them before the examination, but shall not have a copy. *Per Cur.* upon motion. *Ca. Ch.* 66.

And the defendant shall have counsel attending in the next room, when he is examined, for his advice in point of law, if needful. *Ord.* upon motion. *Ca. Ch.* 66.

If the master reports the answer insufficient, when it is good, exceptions may be taken to the report. *Vide post.* (W 3.)

[If, on answer's being reported insufficient, defendant does not except, but puts in second answer, and that is also reported insufficient, defendant may except to this report, as it has not undergone the judgment of the court. If it was a single exception, *Qu.?* *Finch v. Finch*, *M.* 1752, 2 *Ves.* 491.]

[Second answer may be put in, pending exceptions to the first. *Knox v. Symmonds*, 1 *Ves. jun.* 87.]

(M) Cause heard upon Bill and Answer.

IF the answer be sufficient, the plaintiff ought to be well advised, whether he can have a decree, without other proof. *Ord. per Cla. Rules and Orders of Chancery*, 100.

If the cause be heard upon bill and answer, the answer shall be admitted true in all points. *Ord. per Cla. Rules and Orders of Chancery*, 100. *Vide Pract. Reg. in Chan.* 316.

And no evidence shall be admitted, but matter of record, to which the answer refers, and which is proveable by the record itself. *Ord. per Cla. Rules and Orders of Chancery*, 100.

So, if the plaintiff replies, but, without a rejoinder or rules for publication, sets down the cause to be heard, the answer shall be admitted to be true in all points. 2 *Ca. Ch.* 21.

[If a plaintiff of full age does not reply to the defendant's answer, it is an admission of the facts in the answer, but if he is an infant it does not affect him, for he can admit nothing. *Legard v. Sheffield*, *T.* 1742, 2 *Atkyns*, 377.]

In the *Exchequer*, if the plaintiff hears his cause upon bill and answer, he ought to serve the defendant with a *subpœna ad audiendum judicium*. *Vide Rules and Orders in Exchequer*, 8. *Rule* 19.

In *Chancery*, if the defendant by his answer says, *he believes and doubts not to prove the plaintiff paid*, if the cause is heard upon bill and answer, the plaintiff's bill shall be dismissed; for altho' the defendant does not say positively, that he has paid the plaintiff, yet the plaintiff ought to reply, otherwise the defendant is prevented of his proof; and therefore the plaintiff had leave to reply upon payment of costs. 1 *Ver.* 140.

If the plaintiff proceeds, when he might have relief upon bill and

and answer, tho' he afterwards obtains a decree, yet he shall pay costs.

If, upon the hearing, it appears that the plaintiff is not ready for a decree, upon the matter disclosed in the answer he shall have liberty to reply, and proceed upon payment of 5*l.* costs. *Per Cur. P. 2 Ann. Vide Pract. Reg. in Chan.* 317. So, in the *Exchequer*, and he shall reply within eight days, otherwise the defendant shall be dismissed with the said 5*l.* costs. *Rules and Orders in Exchequer*, 8. *Rule* 19.

[If, the answer not being sufficient, an issue at law is directed, and plaintiff nonsuited, the bill shall be dismissed with taxed costs. *Newsham v. Gray*, *P.* 1742, 2 *Atkyns*, 286.]

[So, on a bill to redeem, referred to a master to take an account, and to appoint a day, if the mortgagor does not redeem on the day. *Ibid.*]

[So, on a bill to be relieved against the penalty of a bond, if the principal, &c. is not paid on the day. *Ibid.*]

[If the plaintiff replies, and then moves to withdraw replication and amend bill, then sets down on bill and answer, he shall on dismissal pay taxed costs. *Semb. sed qu. ibid.*]

[By a general order, 27th April 1748, costs on causes heard on bill and answer are to be at the discretion of the court.]

(N) Replication.

AFTER a full answer made, the defendant in the next term may give a rule for the plaintiff to reply; and if he does not reply in the same term, his bill shall be dismissed with costs. *Vide Pract. Reg. in Chan.* 318.

The plaintiff upon the dismissal shall pay full costs. 1 *Ver.* 334.

Or, after answer, the plaintiff himself may move to have his own bill dismissed. *Vide Pract. Reg. in Chan.* 144. In the *Exchequer* it shall be dismissed with 40*s.* costs, unless the court increases them. *Vide Rules and Orders in Exchequer*, 8. *Rule* 17.

If no rule be given, or motion made for the dismissal, the plaintiff shall make a replication before the end of the third term inclusive, otherwise his bill will be dismissed with costs. *Vide Pract. Reg. in Chan.* 318.

In the *Exchequer*, if the plaintiff does not reply the next term after answer, the defendant may give a rule to reply within a week in the subsequent term; and if he does not then reply, the bill shall be dismissed with 5 marks costs. *Rules and Orders in Exchequer*, 8. *Rule* 20.

If there be not a week in term, the plaintiff shall have a day to shew cause, at the setting down of causes. *Rules and Orders in Exchequer*, 9. *Rule* 20.

If the defendant gives a rule, he ought to rejoin *gratis* and join in commission; and if the plaintiff does not take out a commission in the next term, the defendant may take it out *ex parte*, or dismiss the bill with 5*l.* costs. *Rules and Orders in Exchequer*, 9. *Rule* 20.

In *Chancery*, the replication shall be general or special. *Vide Pract. Reg. in Chan.* 315.

Shall

Shall be succinct, and not scandalous. *Vide Pract. Reg. in Chan.*

316.

Must maintain the bill, and confess, avoid, deny, or traverse the answer. *Vide Pract. Reg. in Chan.* 315.

Shall not contain matter which does not tend to avoid the answer. *Vide Pract. Reg. in Chan.* 316.

Nor, proceed to proof in matters confessed by the answer, but in other things only. *Vide Rules and Orders of Chancery*, 100. *Vide Pract. Reg. in Chan.* 316.

On a general demand for tythes, and a general replication, if plaintiff on the commission gives notice that he will examine only as to such matters, it is as well as if the demand had been abridged in the replication. *Anon. in Sc. H.* 1717, *Bunb.* 22. (*sed. qu.*)

[If defendant disclaims generally, plaintiff ought not to reply; if he does, and serves *subpœna* to rejoin, he shall pay costs. *Williams v. Long fellow*, *M.* 1747, 3 *Atkyns*, 582.]

If a special replication be given, the defendant may plead or demur to it. 1 *Ver.* 351.

But if the plea and demurrer are allowed, the plaintiff may afterwards put in a general replication. *Dub.* 1 *Ver.* 351.

If, after a bill and a special replication, the defendant recovers by a verdict at law, he may plead it in such a manner as to prevent an examination into the matter settled by the trial. 1 *Ver.* 351.

[The court will not give leave to withdraw replication, unless it be added, that plaintiff may thereby be enabled to amend his bill, or some other reason to induce the court: or, *Qu.* if he consents to pay full costs if his bill is dismissed at the hearing. *Pott v. Reynolds*, *T.* 1747, 3 *Atkyns*, 565.]

[On discovery of new matter in an account, supplemental answer permitted after replication. *Moggridge v. Hodgson*, *Anstr.* 443.]

(O) Rejoinder, &c.

AFTER replication, the defendant may rejoin *gratis*, and compel the plaintiff to join in commission. *Vide Pract. Reg. in Chan.*

314.

If he does not do it, the plaintiff may serve him with a *subpœna* to rejoin.

The plaintiff shall not have a *subpœna* to rejoin, unless the replication be filed before the return of it; for if the defendant does not find the replication filed, he shall have the ordinary costs. *Ord. per Cla. Rules and Orders of Chancery*, 102.

[If plaintiff produces order for *subpœna* to rejoin, and affidavit that some of the parties are out of the kingdom, the court will not dismiss bill for want of prosecution. *General Order*, *T.* 1743, 2 *Atkyns*, 604.]

[If for want of producing such order and affidavit the bill has been dismissed, yet on producing them, afterwards, and paying costs out of purse, the court will retain it; but the order must be dated before the notice to dismiss. *Ibid.*]

After the return of this *subpœna*, and an affidavit of the service, the plaintiff shall give a rule, that the defendant shall rejoin within seven days; and if he does not, he cannot do it afterwards.

If the defendant does not rejoin, or if he does rejoin, but at the request of the plaintiff's clerk does not give the names of commissioners before the end of the same term, the plaintiff without motion, or petition, shall take out a commission *ex parte*. *Vide Pract. Reg. in Chan.* 314.

By order in the *Exchequer*, if the defendant makes answer by commission, he ought to rejoin *gratis*, and join in commission to examine witnesses; otherwise the plaintiff shall take out a commission *ex parte*, within a week after the end of the term. *Rules and Orders in Exchequer*, 3, 4. *Rule* 6.

So, where the defendant is not bound to rejoin *gratis*, if he does not rejoin upon service of a *subpœna*. *Vide Rules and Orders in Exchequer*, 9. *Rule* 21.

The rejoinder shall maintain the answer, and traverse, or confess and avoid the replication. *Vide Pract. Reg. in Chan.* 314.

The plaintiff, if necessary, may surrejoin, and the defendant rebut to it. *Ibid.*

[But as the court will, in general], permit a plaintiff to rectify any defect or error in his bill, by amendment or supplemental bill; and will also, in some cases, permit a defendant to rectify an error, or supply a defect in his answer, either by amendment or a farther answer; special replications, and the subsequent pleadings, are now but little used. *Mitford's Pleadings in Chancery*, 19.]

(P) Examination of Witnesses,

(P 1.) By the Examiner.

WHEN the parties are at issue, they shall proceed to the examination of witnesses. *Vide Rules and Orders of Chancery*, 103.

But no examination can be before answer. *Vide Pract. Reg. in Chan.* 161.

Each party may examine his witnesses before an examiner of the court, if he pleases. *Ibid.*

And ought to examine them before him, if they live within ten miles of *London*, unless a commission be allowed for special cause upon motion and *affidavit*. *Ord. per Cla.* *Vide Rules and Orders of Chancery*, 109.

And all depositions taken by commission, without special order, within *London* or ten miles of it, shall be superseded *ipso facto*, and not be admitted as evidence at the hearing of the cause, and he who procured them shall be punished. *Ord. per Cla.* *Rules and Orders of Chancery*, 109. *Vide Pract. Reg. in Chan.* 85.

The witnesses shall be examined by the examiner himself, and not by his clerks. *Ord. per Cla.* *Rules and Orders of Chancery*, 105. *Vide Pract. Reg. in Chan.* 159.

And shall be shewn to the adverse party, or his clerk, before they are produced to the examiner. *Ord. per Cla.* *Rules and Orders of Chancery*, 103. *Vide Pract. Reg. in Chan.* 163.

And after answer, but before the rule for passing publication is served, a note in writing of the name, title, and dwelling of the witnesses examined shall be delivered to the adverse party or his clerk; and the examiner ought to see that such notice is given. *Ibid.*

The

The examiner shall not discover any interrogatory, before publication. *Vide Pract. Reg. in Chan.* 158.

And shall have no person in his office, who does not take an oath, that he will not directly or indirectly discover, or give a copy of any interrogatory delivered to him, or in his office, before publication. *Ord. per Cla. Rules and Orders of Chancery*, 106, *Vide Pract. Reg. in Chan.* 159.

(P 2.) By Commission.

If the witnesses live above ten miles out of *London*, or within, upon special cause, the parties may take out a commission to examine them. *Vide Rules and Orders of Chancery*, 109. *Vide Pract. Reg. in Chan.* 85.

If the parties join in commission, one of them shall give the names of four commissioners, and the other of four others; and two of each side shall be refused by the other party. *Vide Pract. Reg. in Chan.* 84.

If the defendant submits to answer upon interrogatories, or for a contempt, which ought to be by rule, within four days, or shall stand committed; yet if he be in the country, a commission shall be allowed him. 1 *Ver.* 187.

The commissioners shall not be of kin to either party. *Vide Pract. Reg. in Chan.* 84.

Nor, master, lessor, or partner. *Ibid.*

Nor, counsel, attorney, or solicitor in the cause. *Ibid.*

[If a commissioner is plaintiff's solicitor, the depositions shall be suppressed, and the solicitor pay all costs. *Fricker v. Moore*, *M.* 1730, *Bunb.* 289.]

Nor, a creditor, or concerned in a suit with either party. *Vide Pract. Reg. in Chan.* 84.

And by order 9th *Feb.* 8 *Geo.* commissioners and their clerks shall be sworn to act impartially, and not disclose the contents of the depositions till publication. *Vide Rules and Orders of Chancery*, 207, 8, 9.

But they may take a reward; and an *assumpsit* lies for non-payment, for they are named by the party. *R.* 1 *Sal.* 330.

The plaintiff, in the first place, shall have the carriage of the commission. *Vide Pract. Reg. in Chan.* 83.

And he who has it, shall give 14 days notice to the other side, in person or by note in writing, of the time and place of the execution. *Vide Pract. Reg. in Chan.* 86.

[If there are four commissioners of a side, plaintiff may give notice of execution to any two of defendant's commissioners. *Anon.* *P.* 1748, 3 *Atkyns*, 633.]

But if by the default of him or his commissioners, it be not executed at the said time and place, he shall pay all costs which appear to have been expended by the other side upon *affidavit*, in fees, entertainment of the commissioners, witnesses, &c. shall take out another commission at his own charge, and suffer the other side to have the carriage of it. *Ord. per Cla. Vide Rules and Orders of Chancery*, 108. *Vide Pract. Reg. in Chan.* 86. 88. So, in the *Exchequer*. *Vide Rules and Orders in Exchequer*, 9. Rule 22.

Otherwise,

Otherwise, if by the default of the clerk; for then it shall be renewed at the equal charge, or at the charge of him who procured the non-execution. *Vide Pract. Reg. in Chan.* 88.

In the *Exchequer* upon a commission renewed, the other party may join and cross-examine the witnesses if he pleases. *Rules and Orders in Exchequer*, 9. Rule 22.

But if he examines his own witnesses, he shall pay half the charge. *Rules and Orders in Exchequer*, 10. Rule 22.

So, the other party may have a duplicate of the commission, and if he who takes out the commission does not give eight days notice of the execution, before the return, the other may execute the duplicate upon four days notice, and no second commission shall be awarded without motion. *Ibid.*

If, after an order that notice be given to one defendant, notice be given to another, who has but a small interest in the cause; another commission shall be awarded, and carried by that defendant to whom the notice ought to have been given.

If a commission be renewed upon the default of the defendant or his commissioners, or because he has not examined all his witnesses, he shall examine all his witnesses before the return of that commission, either upon the commission or in court, at his peril; and no other commission shall issue, but for the examination of witnesses beyond sea, or by order of the court. *Rules and Orders in Exchequer*, 10. Rule 23.

In *Chancery*, no commission shall be granted after publication, without order. *Vide Pract. Reg. in Chan.* 89.

So, in the *Exchequer* there shall be no commission for the examination of witnesses in *London* or within ten miles of *London*, without order upon an *affidavit*, that the witnesses are unable to come, or other cause. *Rules and Orders in Exchequer*, 10. Rule 24.

And if such commission be without order, it shall be suppressed *ipso facto*, and the depositions thereupon shall not be read at the hearing of the cause. *Ibid.*

[The *Exchequer* may issue a commission to examine witnesses abroad to make use of the depositions at the trial of the cause. *Jenkins v. Larwood*, P. 1717, in *Sc. B.*]

[The court will not grant a commission to examine, to be made use of in trial at law, before issue is joined here. *Lowther v. Whorwood*, M. 1722, *Bunb.* 120.]

In *Chancery*, if the commissioners have authority by their commission, they ought to summon the witnesses before them. *Vide Pract. Reg. in Chan.* 89.

If they have not authority, the witnesses ought to be served with a *subpoena ad testificand.* *Ibid.*

The commissioners ought to demean themselves well in the examination of the witnesses; for upon an *affidavit* of misbehaviour, an attachment lies against them.

If they are obstructed they ought to certify the obstruction. *Vide Pract. Reg. in Chan.* 92.

If they cannot agree, an examiner shall be sent to them. *Vide Pract. Reg. in Chan.* 93.

If the commission be obtained by a *feme-sole*, who marries before the execution, yet they may proceed.

The

The commissioners may adjourn to another place, or time, if the witnesses are infirm, &c. *Ca. Ch.* 282.

After examination of the witnesses, the commissioners ought to annex the depositions with the interrogatories to the commission, and return it. *Vide Pract. Reg. in Chan.* 92.

And the commission executed shall be delivered to a master of the court by a commissioner himself. *Ibid.*

Or, by one who shall make oath, that he received it from one of the commissioners, and does not know of any alteration. *Vide Pract. Reg. in Chan.* 79. 92.

A commission shall not be quashed upon petition, but only after a reference and certificate. *Vide Pract. Reg. in Chan.* 86.

A commission in the *Exchequer* ought to be executed the next vacation, where the plaintiff replies after the cause is set down upon bill and answer. *Vide Rules and Orders in Exchequer*, 8. Rule 19.

[If a commission in *England* is taken out in the vacation, returnable *without delay*, it does not expire the first day of next term, but may be continued in execution to the last day of it. *Barnsley v. Powell*, M. 1747, 3 *Atkyns*, 593.]

[In a suit to obtain testimony for defence of an action at law, the court refused to grant a commission to examine witnesses abroad, on an affidavit of the plaintiff's solicitor, that from the inspection of certain papers, he believed the examination to be necessary. *Shedden v. Baring*, 3 *Anstr.* 880.]

[The court of *C. P.* will not, by putting off a trial or other indirect means, compel a party to consent to a commission for the examination of witnesses in *Scotland*. *Calliand v. Vaughan*, *C. P. H.* 38 *Geo.* 3. 1 *Bos. & Pull. Rep.* 210.]

[Where contradictory verdicts have been found on a policy of insurance, and a third action brought against another under-writer, the court of *C. P.* will not put off the trial to enable him to obtain a commission from a court of equity for the examination of witnesses in *Scotland*, to the same facts which were given in evidence on the last trial; more particularly if he has obtained time to plead on the usual terms. *Ibid.*]

[A commission to examine witnesses abroad, cannot be granted without an affidavit of materiality, altho' the suit is merely to obtain evidence to support an action. *Anon.* 1 *Anstr.* 201. See also *Oldham v. Carleton*, 4 *Bro. C. C.* 88.]

[A married woman living in *America* being entitled to a legacy, a commission to examine her would have been directed; but as she had been examined under a commission issued by the *American* government, that was considered sufficient. *Campbell v. French*, 3 *Ves. jun.* 321.]

(P 3.) Commission *ex parte*.

If the defendant does not join, or refuses to name commissioners, the plaintiff may have a commission *ex parte*, and shall name six commissioners, two of whom shall be left out by the court. *Vide Pract. Reg. in Chan.* 85.

Or, if he who carries the commission, does not give sufficient notice of the execution, the other may have a commission *ex parte*.

Or,

Or, if the plaintiff refuses to join, the defendant may have a commission *ex parte*. *Vide Pract. Reg. in Chan.* 82, 83.

Or, if the plaintiff examines his witnesses before an examiner of the court.

He who takes out a commission *ex parte*, need not give notice to the other of the execution. *Vide Pract. Reg. in Chan.* 85.

So, in the *Exchequer*, if there be a commission in an information, in the nature of an inquisition, to entitle the king, it shall be taken out *ex parte*, and the defendant shall not join in commission. *Sav.* 4.

Otherwise, where the commission is after plea and issue joined, for then the defendant shall join; because then it is to prove the title of the king. *Sav.* 4.

(P 4.) New Commission.

If the defendant serves his witnesses, and they do not appear, he shall have a new commission by consent, or by order of court. *Vide Pract. Reg. in Chan.* 90.

But if he does not examine any witness nor puts in his interrogatories, he shall not have it, without order upon motion and *affidavit*, and costs paid. *Vide Pract. Reg. in Chan.* 88.

And he shall bear all the charge of it in court and in the country; except where the other also examines more witnesses; for then it shall be at equal charge. *Ord. per Cla. Vide Rules and Orders of Chancery*, 108. *Vide Pract. Reg. in Chan.* 87, 88.

And he shall bear the charge, tho' the other side cross-examines his witnesses. *Ord. per Cla. Vide Rules and Orders of Chancery*, 108. *Vide Pract. Reg. in Chan.* 87, 8.

And the charge shall be ascertained by the *affidavit* of him who expended it. *Ord. per Cla. Vide Rules and Orders of Chancery*, 108. *Vide Pract. Reg. in Chan.* 88.

If he examines a witness, he shall not have a new commission to re-examine him, tho' the witness makes *affidavit* that he was surprised. *Ca. Ch.* 25.

But in such case he may have an order, that the witness be examined upon the hearing of the cause.

So, if any party does not examine all his witnesses, there may be a new commission.

Or, if the first commission be quashed,

Or, if by the default of him who had the commission, or of his commissioners it was not executed. *Vide Rules and Orders of Chancery*, 109.

[But where commissioners on one side do not attend; in order to have a new commission, the *affidavits* must state that the party or his agents have not seen the depositions on the other side. 2 *Brown. Ch. Rep.* 1.]

He who has a new commission must examine all his witnesses upon it before the return. *Ord. per Cla. Vide Rules and Orders of Chancery*, 109.

Or, before the end of the term, in which it is returnable in court. *Ibid.*

But he may examine them after the return, upon a special order.

As to new commission in the *Exchequer*, *vide ante*, (P 2.)

[To

[To obtain a commission to examine witnesses abroad, there must be an affidavit that the matter arose there, or sufficient to shew it, read out of the answer. 2 *Brown. Ch. Rep.* 273.]

(P 5.) Interrogatories.

Interrogatories ought to be prepared before the examination of the witnesses. *Vide Pract. Reg. in Chan.* 220.

Which being engrossed shall be delivered to the examiner. *Ibid.*

And shall be sent with the commission to the commissioners. *Ibid.*

And one party shall not know the contents of the interrogatories of the other.

In the *Exchequer*, after interrogatories exhibited by either party, there shall be no addition or alteration, without leave of the court. *Rules and Orders in Exchequer*, 11. *Rule* 24.

Interrogatories in *Chancery* must be short, material, and apt. *Vide Rules and Orders of Chancery*, 103. *Vide Pract. Reg. in Chan.* 220.

And only to points necessary. *Ord. per Cla.* *Vide Rules and Orders of Chancery*, 103. *Vide Pract. Reg. in Chan.* 220.

And by order 29th *April* 3 *Jac.* 2. they shall be perused and signed by counsel, or otherwise suppressed. *Vide Rules and Orders of Chancery*, 173. *Vide Pract. Reg. in Chan.* 220.

But a witness cannot demur to an interrogatory, if it be not material. 1 *Ver.* 165.

When the witnesses are examined in court upon a schedule of interrogatories, no other interrogatories can afterwards be added for the same witnesses. *Ord. per Cla.* *Rules and Orders of Chancery*, 103. *Vide Pract. Reg. in Chan.* 221.

So, when the party hath had a commission present upon the first examination, he shall not examine upon new interrogatories, by another commission, as to the merits of the cause. *Ca. Ch.* 274.

But as to an alteration of exhibits made at the first examination, he may. *Ibid.*

So, if witnesses are examined by the examiner, each party may afterwards exhibit one or more interrogatories, or a new set of interrogatories, for the examination of the same or other witnesses, by reason of the credit of the examiner who is a sworn officer. *Pr. Cha.* 386.

[A creditor, who has proved before the deputy remembrancer his demand on the estate in the cause, not suffered to exhibit interrogatories to plaintiff to discover the demands due from him to the estate; because each creditor might claim the same privilege. *Bowen v. Webb, Anstr.* 361.]

[Impertinent interrogatories suppressed. 1 *Ves. jun.* 400.]

[An interrogatory being suppressed as leading, the court, under the circumstances of the case, gave leave to exhibit a fresh interrogatory. *Mentill v. Payne*, 3 *Anstr.* 923.]

(P 6.) The Manner of Examination.

The examiner, or the commissioners, ought to examine the witnesses to the interrogatories *seriatim*. *Ord. per Cla.* *Rules and Orders of Chancery*, 105. *Vide Pract. Reg. in Chan.* 90. 164.

And not permit them to read or hear more interrogatories, before they

they have answered the first. *Ord. per Cla. Rules and Orders of Chancery*, 105. *Vide Pract. Reg. in Chan.* 90. 164.

Nor, permit them to depart before their answer is finished to any interrogatory. *Ibid.*

Nor, permit them to write their depositions, upon seeing all the interrogatories. *Ibid.*

And if a witness will not conform, they shall not proceed further in the examination, without notice given to the other party, and his consent, or an order of court. *Ord. per Cla. Vide Rules and Orders of Chancery*, 105. *Vide Pract. Reg. in Chan.* 165.

They ought to hold the witness to the question interrogated, without writing vain repetitions, or impertinent circumstances. *Ord. per Cla. Rules and Orders of Chancery*, 105. *Vide Pract. Reg. in Chan.* 90. 159.

To an interrogatory, of which the witness does not know any thing, the examiner shall write nothing but, *to this interrogatory this examinant doth not depose*; and if he does, for the lengthening of the depositions, he shall recompence the party grieved as the court shall assess. *Ord. per Cla. Rules and Orders of Chancery*, 106. *Vide Pract. Reg. in Chan.* 165.

If a commissioner to take examinations be a witness, he ought to be examined before he has heard any other examination. *2 Ca. Ch.* 79. *Vide Pract. Reg. in Chan.* 91.

If an examination be irregular, the deposition shall be suppressed; as, if a witness be three times examined to the same matter. *2 Ca. Ch.* 79. Tho' he spoke uncertainly at the first. *2 Ca. Ch.* 217.

So, if a commissioner, &c. be examined in court, or elsewhere, after hearing the other examinations. *2 Ca. Ch.* 79.

[The spiritual court may be obliged to deliver out a will of land on security. *Morse v. Roach*, *H. 7 G. 2. Str.* 961.]

[If all the devisees consent, but otherwise not, the court will order the will to be delivered (on security) to be carried abroad, to be proved under a commission by a witness always residing there. *Fredrick v. Aynscombe*, *M.* 1738, 1 *Atkyns*, 627.]

[Lord Macclesfield ordered a will to be delivered by the prerogative office to the register office in *Symond's Inn*, there to lie till the court of *Chancery* had done with it. *Ibid.*]

(P 7.) What Witnesses shall be examined.

The party himself, or his wife, his counsel, attorney, or solicitor, shall not be examined, unless upon special cause. *Vide Pract. Reg. in Chan.* 360, 361. 364, 365.

[Tho' an attorney or counsel may demur to being examined, yet he may consent, and the court will hear his deposition. *Maddox v. Maddox*, *M.* 1747, 1 *Vesey*, 61.]

[Where a party examines his own attorney or clerk in court, the other side may cross-examine him relative to the same matter, but not as to other points. *Vaillant v. Dodemead*, *H.* 1742, 2 *Atkyns*, 524.]

[A clerk in court or solicitor may be examined, touching transactions antecedent to the commencement of the suit, and the knowledge whereof could not come to him as such. *Ibid.*]

[No person is privileged from being examined, except of the profession,

fession, as counsel, attorney, or solicitor; nor an agent, for he may be only a steward or servant. 2 *Atkyns*, 524.]

[A clerk in court may be examined to prove a deed, for a conveyancer may be examined. *Ibid.*]

[A demurrer by a witness, for that he knows nothing but what came to his knowledge as clerk in court, or agent for defendant in relation to the matters in question in the cause, is not good; for it ought to conclude, that he knew nothing but by the information of his client. *Ibid.*]

[An attorney may be called to disclose what passed at the execution of a deed as a witness, or having been sent by his client with orders to put a judgment in execution. That is an act; but he is not to disclose private conversation, as to the reasons for executing the deed. Depositions referred to the master to see what part came to the knowledge of witness as confidential attorney, that it might be suppressed. *Sandford v. Kemington*, 2 *Ves. jun.* 189.]

[Witness examined before decree under a release, which he executed, but which by mere accident did not cover a very small debt due to him, in respect of which he was therefore interested, and incompetent, on motion allowed to be generally examined after decree. *Sandford v. —*, 1 *Ves. jun.* 398.]

[If the witness were competent at first, the second examination can go only to matter substantially different. *Ibid.*]

[And that not without application to the court. *Ibid.*]

Nor, a guardian against an infant. *Vide Pract. Reg. in Chan.* 361.

Nor, a plaintiff for another plaintiff, tho' he be but a trustee; but the bill shall first be dismissed as to him. 1 *Ver.* 230.

And if an order be obtained by surprise for the examination of any such, it shall be disallowed. 2 *Ca. Ch.* 80.

If a witness demurs to an interrogatory, because he has an interest, he ought to swear what interest. 2 *Ca. Ch.* 208.

[The owner of lands in a parish, in the hands of a tenant, may be a witness in a suit for tithes in that parish. *Ayde v. Flower*, T. 1716, in *Sc. Bunb.* 7.]

[Inhabitant of a parish where a *modus* is insisted on, is *prima facie* a bad witness; if he occupies no titheable land, he must shew it. *Watson v. Lindfel*, in *Sc. P.* 1719, *Bunb.* 40.]

A witness shall not be examined to impeach the testimony of another witness, without a special order of court, which is not frequently granted. *Ord. per Cla.* *Vide Rules and Orders of Chancery*, 105. *Vide Pract. Reg. in Chan.* 165.

And then exceptions to the witness impeached shall be filed with the examiner *gratis*, and notice, with a copy of the exceptions, delivered *gratis*, to the adverse party, or his clerk. *Ibid.*

[There may be an order to examine to the credit of a witness even before publication. *Bonning v. Sprott*, in *Sc. T.* 1719, *Bunb.* 46.]

[Articles may be exhibited to examine the credit of a witness, but they should be supported by affidavit. *Et per Hardwicke C.*—Tho' at law you can examine only to the general credit, yet in equity it is otherwise, and you may examine to a particular charge. *Sed qu. Gill v. Watson*, T. 1747, 3 *Atkyns*, 522.]

[After publication, the court will not allow articles to be exhibited against the competency of a witness. *Callaghan v. Rochfort*, P. 1748, 3 *Atkyns*, 643.]

[But if the objection to competency comes to the knowledge of the party after examination, the court will allow an examination to it after publication, on motion. 3 *Atkyns*, 643.]

[After publication, the court will grant commission to examine in support of articles against the credit of a witness; but if it is abroad or in *Ireland*, there must be an affidavit that no person in *England* can swear as to the witnesses' credit. *Ibid.*]

[After the cause set down, the court will sometimes give leave to exhibit interrogatories to the credit of a witness, to prove exhibits, and cross-examine witnesses already examined. *Barnsley v. Powell*, M. 1747, 3 *Atkyns*, 593.]

[After the cause in paper the court will not give leave to exhibit interrogatories, and a commission to examine to the credit of a witness. *Gill v. Watson*, T. 1747, 3 *Atkyns*, 522.]

If a defendant has no interest, or disclaims, or is only a trustee, by order he may be examined as a witness. 2 *Ca. Ch.* 214.

[An administrator *durante minore etate*, after administration determined, is in general a competent witness; but if by his answer he has submitted to pay, and so made himself liable, he is not competent. *Fotherby v. Pate*, H. 1747, 3 *Atkyns*, 603.]

So, a commissioner himself, if he is examined before any other witnesses. 1 *Vern.* 369.

So, a defendant being only a trustee, if he disclaims all interest. 1 *Vern.* 230.

[Defendant examined as a witness; bill dismissed as to him with costs. 1 *Ves. jun.* 426.]

A witness upon deliberation may amend his deposition. *Vide Pract. Reg. in Chan.* 90, 91.

[Witness examined on the first commission, cannot be examined on the second without leave. *Per Price B. Dudds v. Billings*, in S. T. 1718, *Bunb.* 24.]

No witness need submit to an examination till his expences are discharged.

And if he is sick, the commissioners ought to go to his habitation.

(P 8.) Depositions.

The depositions ought to be written in one or more rolls of parchment, each of them to be subscribed by the commissioners. *Vide Pract. Reg. in Chan.* 92.

And the examiner shall enter the name of the witness, his age, and dwelling, and the name of him who gave notice of the name, and dwelling of the witness, and to whom such notice was given, and the time when. *Ord. per Cla.* *Vide Rules and Orders of Chancery*, 103. *Vide Pract. in Chan.* 163.

If the clerk deliver an abstract of a deposition, or interrogatory, to any one before publication, he shall be expelled the office; and if his clerk does so, the examiner shall answer to the court for the misdemeanor, and to the party for costs and damages, and every person concerned shall be punished as the court shall think proper. *Ord. per Cla.* *Rules and Orders of Chancery*, 106. *Vide Pract. Reg. in Chan.* 159, 160.

Depositions obtained by mal-practice shall be suppressed by order of the court. *Vide Pract. Reg. in Chan.* 137. So,

So, if they are falsely written; and the witnesses shall be examined *de novo*. *Vide Pract. Reg. in Chan.* 138.

So, if the same witness be examined three times to the same thing. 2 *Ca. Ch.* 79.

But they shall not be suppressed upon a petition, nor upon motion, without a certificate of a six-clerk; for a rule shall be entred with the register, of course, to attend a six-clerk not concerned in the cause; and if the attornies do not agree before him, he shall certify the fact, with his opinion to the court. *Ord. per Cla. Rules and Orders of Chancery*, 110. *Vide Pract. Reg. in Chan.* 138.

[If witnesses are examined on a commission abroad, after the death of plaintiff, neither commissioners nor witnesses knowing it, the depositions shall not be suppressed. *Thompson's Case*, T. 1733, P.W. 195.]

[Depositions and interrogatories may be referred for scandal and impertinence, and if found so, the court will order it to be expunged. *Cocks v. Worthington*, M. 1741, 2 *Atkyns*, 235, 236.]

[But whether for impertinence alone, *dub.* *Pyncent v. Pyncent*, T. 1747, 3 *Atkyns*, 557.]

[Depositions *de bene esse* taken *ex parte*, and without notice suppressed. *Loveden v. Ld. Milford*, 4 *Bro. C. C.* 540.]

[In the court of Chancery, depositions taken in one cause are frequently read in another, saving all just exceptions; as, that they are not between other parties, &c. 4 *T. R.* 290.]

(Q) Publication.

AFTER the plaintiff and defendant have examined all their witnesses, if the examination was by an examiner, two rules are given by each of them, to shew cause why publication should not pass. *Ord. per Cla. Rules and Orders of Chancery*, 107. *Vide Pract. Reg. in Chan.* 297.

If the examination was by commission, one rule is sufficient. *Ibid.*

And the time contained in the rule shall be a week. *Vide Pract. Reg. in Chan.* 297. A week after the return of the commission, or examination in the *Exchequer*. *Rules and Orders in Exchequer*, 11. *Rule* 25.

If no cause be shewn to the contrary, nor a new commission granted, publication shall be allowed. *Ord. per Cla. Rules and Orders of Chancery*, 107. *Vide Pract. Reg. in Chan.* 297.

[If a cross-bill is filed before answer put in to the original bill, the court will stay proceedings till the answer is put into the cross-bill; if it is filed after answer, the court will only stay publication. *Ramkissenfeat v. Barker*, M. 1739, 1 *Atkyns*, 19.]

[The court in such case will enlarge publication in the original cause to a fortnight after the answer to the cross-bill is come in. *Creswick v. Creswick*, M. 1738, 1 *Atkyns*, 291.]

[If original bill has been proceeded in, publication on the cross-bill shall not be enlarged, but on special motion. *Aylet v. Easy*, T. 1751, 2 *Vesey*, 336.]

[After publication passed, and depositions delivered to be copied,
VOL. II. U publication

publication can never be enlarged (in the exchequer). *Orlebar v. Sneed, M. 1733, Bunb. 330.*

[The exhibits proved in a cause cannot be inspected before hearing. *Davers v. Davers, P. 13 G. Str. 764.*]

In the *Exchequer*, if there be not a week in term when the rule is given, there shall be a day to shew cause at the sittings. *Rules and Orders in Exchequer, 11. Rule 25.*

In *Chancery*, after publication allowed, more witnesses shall not be examined, without order of court, upon an *affidavit*, that the party is not privy to the examination of any other witness before examined, and of a sufficient cause why such witness could not have been examined before. *Vide Pract. Reg. in Chan. 161, 2.*

Or, that such sufficient cause be certified, by the commissioners. *Vide Pract. Reg. in Chan. 162.*

And there shall be a proviso in the order, that the party shall not see the former examination in the mean time. *Ibid.*

[The court will sometimes grant a new commission after publication is passed, and the cause set down, if the former commission was closed long before its expiration, and without the knowledge of one of the parties. *Barnsley v. Powell, M. 1747, 3 Atkins, 593.*]

After publication, a new witness shall not be examined, tho' he was sworn before. *Vide Rules and Orders of Chancery, 104. Vide Pract. Reg. in Chan. 164.*

But an examination after publication, is in the discretion of the court, who ordered it after publication, and hearing of the cause and a trial at law directed, where the witness was of the age of eighty years, and could not come to the trial, and a freehold given to charitable uses, which is not properly triable at law, was concerned. *Ca. Ch. 229.*

And if the court allows an examination after publication, upon the usual *affidavit*, the other party may examine other witnesses, and also cross-examine those produced by the adverse party. *1 Ver. 253.*

[If on the hearing defendant is ordered to be examined on interrogatories touching a deed supposed to be in his custody, which on examination he denies, there shall no commission be granted to examine witnesses, (publication being passed,) tho' the master certifies that he thinks it reasonable. *Smith v. Turner, H. 1735, 3 P. W. 413.*]

After publication, a witness before examined shall not be admitted to explain his deposition. *1 Ver. 125.*

After publication, the party may have his depositions exemplified. *Vide Pract. Reg. in Chan. 141.*

But the master shall not sign any exemplification, till the original be produced before him. *Ord. per Cla. Rules and Orders in Chancery, 118. Vide Pract. Reg. in Chan. 138, 9.*

[If a bill sets forth, that there was heretofore a bill preferred by another against the present defendant's father, who answered, and depositions taken, and refers thereto. This suit abated by death before hearing; these depositions shall not now be published to be used in the present cause, tho' on the defendant's motion, notwithstanding plaintiff's setting forth in his bill. *Johns v. Stafford, in Sc. M. 1719, Bunb. 50.*]

(R) Examination in *perpetuam Rei Memoriam*.

HE who would examine witnesses in *perpetuam rei memoriam*, must exhibit his bill, and thereby shew his title, and the antiquity of his witnesses, and then pray a commission to examine them, and a *subpœna* against the party concerned, to shew cause to the contrary if he can. *Vide Pract. Reg. in Chan.* 31.

If the defendant shews cause to the contrary within fourteen days, the plaintiff shall not proceed. *Vide Pract. Reg. in Chan.* 32.

If he does not shew cause, the plaintiff shall proceed to the examination of witnesses; and the court will give articles for the examination. *Ibid.* (*Vide Pract. Reg. in Chan.* 35. *Cont.* as to the articles.)

[A man may bring a bill to perpetuate testimony, where he cannot bring a bill for relief, without waving the penalty. *E. Suffolk v. Green*, T. 1739, 1 *Atkyns*, 450.]

[Plaintiff is entitled to perpetuate testimony on an usurious contract, tho' he does not offer to pay what is really due. *Ibid.*]

But if the plaintiff prays relief, his bill shall be dismissed. 2 *Vent.* 366.

Yet he may examine witnesses to prove a promise, &c. which is to be performed after the death of A. R. 1 *Roll.* 383. C.

This bill lies to prove a *modus decimandi*. 1 *Ver.* 185.

But such bill to prove a right to a common, way, &c. before a trial, will be dismissed. 1 *Ver.* 308. 312.

Or, to prove a will against a purchaser without notice. R. upon a plea. 1 *Ver.* 354.

Or, to examine witnesses, where there is no impediment to a trial at law. R. upon a demurrer. 1 *Ver.* 441.

[Tenant in tail out of possession cannot bring a bill to perpetuate testimony, till he has recovered possession by ejectment; and demurrer for this cause would be allowed. *Brandlyn v. Ord*, M. 1738, 1 *Atkyns*, 571.]

[Neither can any other claiming a right, and being out of possession, for he may try it at law. *Proc. Ch.* 531.]

[But he who is in possession, and not disturbed, may bring such a bill, because the facts, to which the testimony of the witnesses proposed to be examined, relate, cannot be immediately investigated in a court of law. *Id. ibid.*]

[So, a bill to perpetuate testimony will lie, when the evidence of a material witness is likely to be lost, by his death or departure from the realm, before the matter can be investigated in a court of law: but then an affidavit of the circumstances by which the evidence is likely to be lost, must be annexed. 1 *P. Wms.* 117. 3 *P. Wms.* 77. 1 *Atkyns*, 450.]

So, a bill by the devisee of a person, now a lunatick, to prove in *perpetuam rei memoriam*, will be dismissed. 1 *Ver.* 106.

The witnesses may be examined by an examiner of the court. *Vide Pract. Reg. in Chan.* 36.

Or, the court may appoint commissioners, in which the defendant may join, if he pleases. *Vide Pract. Reg. in Chan.* 34.

And fourteen days notice ought to be given of the execution of the commission. *Ibid.*

In the *Exchequer*, if the defendant does not appear, being served with process, but is in contempt, the plaintiff upon motion shall have a commission to examine witnesses *de bene esse*. *Rules and Orders in Exchequer*, 13. Rule 34.

If the defendant appears, he may join in the commission, if he will, and cross-examine the witnesses, if he gives the names of commissioners within four days after the order for a commission. *Ibid.*

If the defendant afterwards makes answer, the plaintiff shall reply, and examine *de novo* the witnesses before examined, who are alive, and upon the return of the commission there shall be publication of the depositions thereby taken, with the depositions of the witnesses before examined, who were dead before the second commission. *Ibid.*

In *Chancery*, no witnesses shall be examined, but the aged or impotent. *Vide Pract. Reg. in Chan.* 31.

[A witness, tho' neither old nor infirm, may be examined before answer, on affidavit that he alone is privy to the forgery of a deed. *Shirley v. Earl Ferrers*, M. 1733, 3 P. W. 77.]

And if the defendant shews good exceptions against a witness, or other cause for staying of the proceeding, the commissioners ought not to proceed, but to certify such matter with the commission. *Vide Pract. Reg. in Chan.* 32.

And the commissioners ought to certify whether the defendant appears, or not. *Ibid.*

Whether there was an affidavit before them of notice given of the time and place of the execution. *Ibid.*

The depositions shall not be read during the life of the witness, without consent, or order of court. *Vide Pract. Reg. in Chan.* 35.

And such order shall be upon affidavit, that the plaintiff is to have a trial, to which the witnesses cannot come. *Ibid.*

[Plaintiff shall not have leave to examine witnesses *de bene esse*, because they are going to the *East Indies*, if they are his servants, and he might keep them at home. *East India Company v. Naib*, M. 1732, Bunb. 320.]

And if the court allows the use of the depositions, a master shall open the commission and consider them, and then the plaintiff, if he will, may exemplify them, and by order of court give them in evidence in another court. *Vide Pract. Reg. in Chan.* 35, 6.

And after such publication, the defendant shall not examine any witness concerning the same matter. *Vide Pract. Reg. in Chan.* 33, 4.

These depositions shall not be allowed in evidence, but only against the defendant, who had notice, his heirs or assigns. *Vide Pract. Reg. in Chan.* 33.

Or, against one, who claims an interest under the defendant since the bill exhibited. *Vide Pract. Reg. in Chan.* 36, 7.

(S) Cause set down for Hearing.

[AFTER publication, and the cause set down, the bill may be amended by adding parties; but no new charge, nor a material fact put in issue, but a supplemental bill, must be brought. *Goodwin v. Goodwin*, T. 1746, 3 Atkyns, 370.]

After

After all the witnesses examined, and publication passed, the client, or solicitor ought to attend the fix-clerk for six days before the end of the term, and inform him of the state and circumstances of the cause. *Ord. per Cla. Rules and Orders of Chancery, 110. Vide Pract. Reg. in Chan. 186.*

And the fix-clerk shall procure the cause to be set down for hearing with the register, and shall be prepared to inform the lord chancellor, or the master of the rolls, &c. of the nature of the cause, at the time of setting down causes. *Ord. per Cla. Rules and Orders of Chancery, 110, 111. Vide Pract. Reg. in Chan. 187.*

No fee shall be paid to the fix-clerk, or register, or other person for the setting down, or preferring any cause, except their term-fees, if they are in arrear. *Ord. per Cla. Rules and Orders of Chancery, 111. Vide Pract. Reg. in Chan. 187.*

And the arrearages of such fees are cause for stopping the hearing of the cause, when it is called on in court, till they are paid. *Ord. per Cla. Rules and Orders of Chancery, 111. Vide Pract. Reg. in Chan. 187, 8.*

The causes shall be set down according to the order and antiquity of the publication. *Vide Rules and Orders of Chancery, 110. Vide Pract. Reg. in Chan. 186.*

But none shall be set down in the same term, when publication passes. *Vide Pract. Reg. in Chan. 185.*

Nor, before certificate of the fix clerk, that all pleadings are filed. *Ord. 2^d July, 1 W. & M. Rules and Orders of Chancery, 185. Vide Pract. Reg. in Chan. 188.*

[But on application to the court, a cause may be set down upon an early day; however this must be by petition, not on motion. *1 Brown. Ch. Rep. 56.*]

So, in the *Exchequer*, no cause shall be set down before publication, without special order. *Rules and Orders in Exchequer, 11. Rule 27.*

After publication, every cause shall be set down in the next term, except in *London*, or within sixty miles of it; in which, if the replication was filed in *Trinity* or *Hilary* term, and publication passed the first week of *Michaelmas* or *Easter* term, the cause may be set down to be heard the last day of causes in *Michaelmas* or *Easter* term. *Ibid.*

In *Chancery*, the *subpœna ad audiendum judicium* shall be returned six or seven days before the day of hearing of the cause; and the day of hearing shall be indorsed upon it. *Vide Pract. Reg. in Chan. 349.*—In the *Exchequer*, it shall be served ten days before the hearing, in *London*, or within sixty miles of it, and fourteen days in places more remote. *Rules and Orders in Exchequer, 11. Rule 28.*

But in *Chancery*, the hearing being appointed in the beginning of a term, when six or seven days cannot precede, so much time is not necessary. *Vide Pract. Reg. in Chan. 349.*

And in the *Exchequer*, in *Trinity* term, ten days notice is sufficient in places above sixty miles from *London*. *Rules and Orders in Exchequer, 11. Rule 28.*

(T) Hearing of the Cause.

(T 1.) When the Defendant does not appear.

When a cause is heard upon bill and answer, *vide ante* (M).

If at the time of the hearing the defendant does not appear, tho' process appears to have been duly served, his answer shall be read; but the decree shall not be absolute against him; tho' there is cause for a decree for the plaintiff. *Ord. per Cla. Rules and Orders of Chancery, 111. Vide Pract. Reg. in Chan. 190.*

But the register shall say, *that the court, for such and such causes so decrees, if the defendant does not pay the costs assessed to the plaintiff or his attorney, and by such a time shew good cause to the contrary. Ord. per Cla. Rules and Orders of Chancery, 112. Vide Pract. Reg. in Chan. 191.*

And the defendant shall not be admitted then to shew cause, without a certificate from the plaintiff's attorney of the payment of the costs, or an affidavit of tender and refusal. *Ibid.*

And if the court, at the time allowed for cause, confirms the decree, the defendant shall pay full costs.

So, in the *Exchequer*, if a defendant served *ad audiendum judicium*, makes default, whereby there is a decree against him *nisi*, &c. he shall not afterwards be heard to shew cause, till he pays 5 *l.* costs to the plaintiff or his attorney. *Rules and Orders in the Exchequer, 12. Rule 29.*

[If defendant by his answer denies the whole equity of the bill, and the answer is reported insufficient, and defendant duly served makes no further answer, the bill shall be taken *pro confesso*. *Semb. Davis v. Davis, H. 1739, 2 Atkyns, 21.*]

[If one defendant does not appear, and the whole line of process goes against him, it is equal to proceeding to outlawry at law, and there may be a decree against the other defendants who appear. *Van-nessen v. South Sea Company, H. 1749, 1 Vesey, 395.*]

[The court will not declare a will well proved against an heir at law defendant, tho' he makes default, unless the proofs are read. *Webb v. Litcot, H. 1743, 3 Atkyns, 25.*]

(T 2.) When the Plaintiff does not appear.

If at the time of the hearing, the plaintiff does not appear, the defendant shall be dismissed with costs to be taxed by a master. *Vide Pract. Reg. in Chan. 190.*

[As long as depositions are in being, defendant cannot move to dismiss for plaintiff's delay, but must set down the cause to be heard *ad requisit. defendantis*; but if he suppress depositions on plaintiff's delay, he may move to dismiss for want of prosecution. *Anon. in Sc. T. 1718, Bunb. 23.*]

[If a commission has been taken out to examine witnesses, but nothing done upon it, but publication is past, the defendant cannot move to have the bill dismissed, but the cause must be set down, and if the bill is dismissed at hearing, he has his full costs. *Skip v. Warner, T. 1747, 3 Atkyns, 558.*]

When the plaintiff's bill is dismissed of course, or by order for want of prosecution, it shall not be afterwards retained, without motion, and a certificate of the payment of the costs from the defendant's attorney. *Ord. per Cla. Rules and Orders of Chancery, 118. Vide Pract. Reg. in Chan. 146.*

So, in the *Exchequer*, if the defendant is served and appears, and the

the plaintiff does not attend, the cause shall be put out of the paper, and the plaintiff shall pay 5 *l.* costs; and if the defendant puts the cause into the paper to be heard the next term, *ad requisitionem defendantis*, (as he may do,) the plaintiff shall not be heard till he has paid the 5 *l.* costs. *Rules and Orders in Exchequer*, 12. Rule 29.

(T 3.) When there are not Parties.

There ought to be proper parties to the bill. *Vide Pract. Reg. in Chan.* 261, &c. *Vide ante*, (E 2.)

But if a proper party is beyond sea, upon an *affidavit*, that it is not known whether he be dead or alive, the plaintiff shall have a decree against the other defendants, without prejudice. 1 *Ver.* 487.

[A cause for an account and distribution of personal estate may be heard, when a defendant who is abroad has not been served, nor answered. *Rogers v. Linton*, T. 1725, *Bunb.* 200.]

[A bill is never dismissed for want of parties, but stands over on paying costs of the day; and decrees dismissing bills for want of parties have been reversed for that reason. *Anon. M.* 1735, 2 *Atkyns*, 15.]

[If a bill is brought to redeem against the representatives of *mesne* purchaser without notice, and against *puisne* purchaser with notice, and plaintiff does not reply to the answer of the *mesne* purchaser's representatives, they are not proper parties before the court. *Lowther v. Carlton*, H. 1740, 2 *Atkyns*, 139.]

[If a bill is brought against one partner for a joint demand, the other being not amendable because out of the kingdom, the partner before the court shall be decreed to pay the whole debt. *Daravent v. Walton*, H. 1742, 2 *Atkyns*, 510.]

[If a cause stands over for want of some proper defendants, (others being improperly inserted,) you cannot proceed against any other defendant, without dismissing the bill as to those who are improperly before the court. *Wicks v. Marshal*, M. 1746, 3 *Atkyns*, 400.]

(T 4.) What Evidence shall be admitted upon the Hearing.

[*Vide* (3 A 2.)]

(T 4.) *Depositions in the same or a cross cause.*] At the time of the hearing, after the bill and answer are opened by the counsel, the court proceeds to the proof. *Vide Pract. Reg. in Chan.* 189, 190.

The usual proof is reading the depositions made in the same cause. *Vide Pract. Reg. in Chan.* 152.

Depositions in cross causes, between the same parties, heard at the same time, shall be allowed upon both causes without motion. (*Vide Pract. Reg. in Chan.* 152. By order.)—So, in the *Exchequer*. *Vide Rules and Orders in Exchequer*, 11. Rule 26.

Allowed, upon motion. *Ca. Ch.* 236.

But when the allowance was ordered upon the motion of the defendant, after publication in the first cause, and before publication in the second cause, whether the depositions for proof of an agreement, not alleged by the answer of the defendant in the first cause, but alleged by his bill in the second cause, shall be admitted. *Dub. Ca. Ch.* 236.

[If the point in issue in the cross cause was not in issue in the original

ginal cause, the depositions in the original cause cannot be read in the cross cause. *Christian v. Wren*, M. 1732, *Bunb.* 321.]

[Depositions in a cross cause, brought after a decree pronounced in the original cause cannot be read touching the matters in issue in the original cause, but may as to matters not in issue in the original cause. *Wilford v. Beafely*, P. 1747, 3 *Atkyns*, 501.]

[Tho' depositions taken *de bene esse* are irregular, they cannot be objected to at the hearing; you should move to discharge the order for publication. *Dean of Ely v. Warren*, T. 1741, 2 *Atkyns*, 189.]

[Depositions *de bene esse* shall be published, where it is morally impossible to examine the witnesses in chief; as, if a commission has issued to examine in *Sweden*, the king whereof has refused to let it be executed, the commission is come back, and the king of *Sweden* has ordered a public examination before his own judges. *Gafen v. Wordsworth*, T. 1751, 2 *Vesey*, 325. 336.]

[Depositions *de bene esse*, taken many years before, may be published with depositions in a supplemental cause, on affidavit that some of the witnesses are dead, and that nothing can be learned of the others on enquiry: but without prejudice to the exceptions. *Anon.* T. 1754, 2 *Vesey*, 496.]

[But where depositions were taken *de bene esse*, before appearance; the defendant appeared and answered; the witness survived 18 months, and the depositions had been published in pursuance of an order with the consent of the defendant; the master of the rolls thought, that on account of the defendant's consent, the deposition should not be suppressed; but lord chancellor thought it ought not to be read. 1 *Brown. Ch. Rep.* 84.]

But no witness shall be examined *viva voce* at the hearing, without an order before the hearing of the cause. *Vide Pract. Reg. in Chan.* 154. *Vide Rules and Orders in Exchequer*, 10. Rule 23.

[Witnesses are never allowed to be examined at large *viva voce*, at the hearing. *Graves v. Budgell*, P. 1737, 1 *Atkyns*, 444.]

[*Viva voce* examinations are allowed sparingly, and only after publication where doubts have appeared in their depositions, to clear such doubts and inform the court. *Ibid.*]

[At most, only to prove exhibits, not to let in other examinations; and this at the instance of the party to use the exhibits, but never of the contrary party. *Ibid.*]

If the plaintiff after examination of witnesses withdraws his replication, takes exceptions to the answer, and replies to a new answer, and upon a commission witnesses are examined, the depositions upon the former commission shall be suppressed, if the witnesses are not re-examined after the last replication, or allowed by the court, upon motion, to be used at the hearing of the cause. *Pr. Cha.* 386.

[If the cause is brought to hearing, and stands over with liberty to add a party, if he is a material defendant, and concerned in interest, the depositions taken before cannot be read against him. *Niblett v. Daniel*, M. 1731, *Bunb.* 310.]

[The rules of evidence in general are the same in equity as at law. *D. Manning v. Letchmere*, M. 1737, 1 *Atkyns*, 453. *Man v. Ward*, M. 1741, 2 *Atkyns*, 228.]

[A lease and possession, and payment of rent under it, is a presumption of right in the lessor; but if two leases are set up, one cannot

not be read till possession under it is proved. *D. Manning v. Letchmere, M. 1737, 1 Atkyns, 453. Man v. Ward, M. 1741, 2 Atkyns, 228.*

[Receipts for rent are not evidence of title in lessor, unless the payment is proved. *Ibid.*]

[Old rentals, where bailiffs admit money received, are evidence of payment. *Ibid.*]

[A bond or mortgage is *prima facie* good evidence, but if there are manifest signs of fraud in the obligee, he shall be put to prove actual payment. *Piddock v. Brown, T. 1734, 3 P. W. 288.*]

[It is a motion of course, that a defendant for form's sake may be examined, saving just exceptions. *Man v. Ward, M. 1741, 2 Atkyns, 228.*]

[The deposition of a defendant against whom plaintiff can give no evidence may be read for another defendant. *Piddock v. Brown, T. 1734, 3 P. W. 288.*]

[The deposition of a defendant not interested may be read for another defendant, and also for plaintiff, tho' at law defendant cannot be examined for plaintiff; but if defendant may be liable for costs, it cannot be read. *Barret v. Gore, M. 1746, 3 Atkyns, 401.*]

[So, the deposition of one defendant charged with a fraud, cannot be read for another defendant, as it may tend to excuse him with regard to his own costs. *Eade v. Lingood, P. 1747, 1 Atkyns, 203.*]

[The evidence of a co-defendant *particeps fraudis* and interested shall not be read, tho' if only attorney and trustee it may. *Bridgman v. Green, T. 1755, 2 Vesey, 627.*]

[Co-defendants may read against each other whatever is proved for plaintiff. *Walker v. Preswick, T. 1755, 2 Vesey, 622.*]

[What one defendant said on application for payment of a legacy, to which she was not liable, not evidence against other defendants, whose estates were charged with it. *Jones v. Turberville, 2 Ves. jun. 11. 4 Brown. Ch. Ca. 115. S. C.*]

[A mere nominal trustee may be examined in equity, tho' not at law. *Man v. Ward, M. 1741, 2 Atkyns, 228.*]

[An executor in trust is not a good witness for his *cestuy que trust*, tho' a bare trustee is. *Croft v. Pyke, P. 1733, 3 P. W. 180.*]

[The evidence of a husband shall be admitted, tho' his wife is a defendant, if the interest of a third person is concerned. *Cotton v. Lutterel, T. 1738, 1 Atkyns, 451.*]

[The deposition of the wife of the *prochein amy* of plaintiff *feme-covert*, cannot be read for plaintiff. *Head v. Head, P. 1747, 3 Atkyns, 511, T. 1747, 3 Atkyns, 547.*]

[If a plaintiff executor examines his son, and dies, leaving his son executor, who also takes out administration *de bonis non* of the original testator, and he revives, yet his deposition in the original cause may be read. *Haws v. Hand, T. 1743, 2 Atkyns, 615.*]

[If a creditor brings bill against an executor for an account of assets, the evidence of a co-executor, tending to increase testator's estate, cannot be read, for he has an interest. *Mabank v. Metcalf, T. 1744, 3 Atkyns, 95.*]

[The evidence of one having an interest cannot be read, tho' he is satisfied, unless a release is produced. *Anon. M. 1737, 2 Atkyns, 15.*]

[Nor,

[Nor, evidence of bond-creditors of testator to obtain a decree for a legacy. *Jones v. Turberville*, 2 *Ves. jun.* 12.]

[The evidence of a bankrupt who has had his allowance and certificate may be read in a cause where his assignees are parties, for he is not bound to refund. 1 *Brown*. 270.]

[If there is an agreement in writing between *A.* and *B.* the steward of *C.* for sale of *A.*'s estate to *C.*, but the covenant by *B.*, and he bound in penalty for the performance, and *A.* brings bill against *B.* and *C.* charging there was a defeazance prepared, but the execution prevented by *B.*—*B.*'s deposition cannot be read for *C.*, especially if *B.* has examined witnesses. *Dixon v. Parker*, *H.* 1750, 2 *Ves.* 219.]

[Depositions to prove that plaintiff (who sues for dower) had acknowledged a bond to be given in lieu of dower, tho' it does not appear on the face of it, cannot be read. *Finney v. Finney*, *M.* 17 G. 2. *Wilf.* 34.]

[If a person joins fraudulently in granting an estate without the usual covenants, but only that he has done no act to incumber, his deposition may be read to impeach his title to the estate, and to shew it was done to carry on the fraud. *Man v. Ward*, *M.* 1741, 2 *Atkyns*, 228.]

[The evidence of a witness is not invalidated by reason of his tender years, it is of a circumstance likely to make a great impression on his mind. *Smith v. French*, *H.* 1741, 2 *Atkyns*, 243.]

[The deposition of a heathen idolator, sworn according to their ceremonies in the most usual and solemn manner, may be read. *R.* on great consideration, *per Hardwicke*, *C. Lee*, *C. J. Willes*, *C. J.* and *Parker*, *C. B.* *Omychund v. Barker*, *M.* 1744, 1 *Atkyns*, 21.]

[On an appeal from the rolls, the appellant, on petition, may be let in to read new evidence not read there, provided he will give up his deposit. *Hedges v. Cardonnel*, *T.* 1742, 2 *Atkyns*, 408.]

[The court will not enter upon a determination of the constituting a court of a foreign nation, but will hear evidence as to the extent of its jurisdiction, and the nature and effect of the proceedings and sentence in it. *Gage v. Lady Stafford*, *T.* 1754, 2 *Vesey*, 556.]

[Evidence to shew the intent of a marriage settlement, where in itself it admitted of a clear construction, refused. *Ball v. Montgomery*, 2 *Ves. jun.* 191. 4 *Bro. Ch. Ca.* 339. *S. G.*]

[A declaration of uses by the founder of a charity presumed from an entry in an ancient book, purporting to be such declaration, but without signature or date: the book having been kept by the trustees for the time being for entering their proceedings, and containing an order by the trustees, dated six years after the creation of the trust; that the declaration of the founder be then entred as a direction to the trustees. *Attorney-General v. Boulton*, 2 *Vesey, jun.* 380.]

[Evidence to prove the intention of the parties to a settlement refused. *Brydges v. Dukes of Chandos*, 2 *Ves. jun.* 422.]

[Parol evidence admitted in regard to an unbequeathed residue. *Nourse v. Finch*, 1 *Ves. jun.* 344. 2 *Ves. jun.* 78. *Glennell v. Lewthwaite*, & *Thornton v. Tracy*, 2 *Ves. jun.* 465.]

[A will under which defendant claims, admitted in the answer, and on which nothing turns, may be read from the bill, altho' the answer refers to the will for greater certainty. *Owen v. Jones*, 2 *Anst.* 505.]

[Probate

[Probate of a will in the ecclesiastical court sufficient as far as it goes; further proof, if necessary, may be proceeded on in this court 1 *Ves. jun.* 54.]

[In a question, whether wife was barred of her right to be exonerated out of the husband's assets, in respect of money raised by mortgage of her estate, parol evidence to what extent admissible. *Clinton v. Hooper*, 1 *Ves. jun.* 188. 3 *Bro. Ch. Ca.* 201. S. C.]

[Parol evidence to prove an agreement made on the purchase of an annuity that it should be redeemable; defendant not admitting such agreement, refused. *Hare v. Shearwood*, 1 *Ves. jun.* 241. 3 *Bro. Ch. Ca.* 168. S. C. See also, 3 *Ves. jun.* 34.]

[Latent ambiguity produced and dissolved by parol evidence; but which is never admitted on patent ambiguity. 1 *Ves. jun.* 415.]

[A. stated by defendant's books produced in evidence to be a merchant abroad, and one witness swearing he knew him late a merchant abroad, and no evidence of his return sufficiently proved to be out of the jurisdiction of the court; and therefore no objection that he was not a party. *Weymouth v. Boyer*, 1 *Ves. jun.* 416.]

[The examination is evidence in discharge of the party, who is charged by it. *Blount v. Barrow*, 1 *Ves. jun.* 546.]

[The court granted the defendant, after publication, a commission to prove an old paper found in the parish registry, as being in the nature of an exhibit, without deciding on the admissibility of the paper on the evidence suggested. *Clarke v. Jennings*, 1 *Anstr.* 173.]

[A single witness cannot prevail against a positive denial by the answer. *Lord Cranston v. Johnston*, at the Rolls, 3 *Ves. jun.* 170.]

[Testator gave a sum, part of his Four per Cent. Bank Annuities, to his wife for life, and after her decease to several relations: evidence was admitted, that he had no such stock at the date of the will, having previously sold it all, and invested the produce in Long Annuities, and to shew the cause of the mistake; and the legacies were established. *Seldwood v. Mildmay*, at the Rolls, 3 *Ves. jun.* 306. See also *Dobson v. Dobson*, *Ibid.* 308. in not.]

[Testator by codicil in 1776, reciting that he had devised his real estate by his last will, dated 25 Nov. 1752, charged his real estates with his debts and legacies given by the codicil, and appointed executors; the bill was filed by devisees of the real estate under another will of 1756, one of whom was a legatee in the codicil, stating that the will of 1756 was executed in pursuance of an agreement to make mutual wills; that the testator, by the death of the other party, was bound in honour, if not in law, and did not mean to revoke the will of 1756, and revive that of 1752, and praying, that the will of 1756, and the codicil might be established, the trusts carried into execution, and the legacy paid. On an issue directed, the will of 1752 was established, evidence of mistake being rejected: on further directions, the plaintiffs relied on the agreement, and offered evidence in support of it; the bill was dismissed, the Lord Chancellor being of opinion that the relief sought was inconsistent with the frame of the bill, and therefore could not be given under the general prayer, that the evidence ought not to be received; and that on the evidence, the agreement was uncertain and unfair, and therefore not to be executed. *Lord Walpole v. Lord Orford*, 3 *Ves. jun.* 402.]

[Accounts in the testator's hand-writing admitted as evidence of the

the circumstances under which he made his will; but not to explain it. *Hinchcliffe v. Hinchcliffe*, at the Rolls, 3 *Ves. jun.* 516.]

[Parol evidence, to shew who was meant by Lady — in a will, refused. 3 *Bro. Ch. Ca.* 311.]

[Parol evidence not admissible to raise an equity, that a pension granted by the crown to the defendant was in trust for the plaintiff against the oath of the defendant in his answer. *Lady M. Fordyce v. Willis*, 3 *Bro. Ch. Ca.* 577.]

[An absolute conveyance decreed to be only a security on parol evidence; it being clear on the written evidence, and the accounts of the parties, that the agreement was not what the deed purported it to be. *Cripps v. Fee*, at the Rolls, 4 *Brown. Ch. Ca.* 472.]

[Parol evidence not admissible to prove from conversations before and at the time of signing an agreement for a lease, that the intent of the parties was apparent from the memorandum, which was written by the lessee, and the words "clear of all taxes" (which was the purport of the conversation) were omitted in the memorandum. *Rich v. Jackson*, 4 *Brown. Ch. Ca.* 514.]

[T 5.] *In another cause.*] A decree, or examinations of witnesses in a former cause between the same parties, may be read as evidence, tho' not conclusive, altho' thereby there is not an opportunity of examining between co-defendants. *Askew v. Poulterers' Company*, *M.* 1750, 2 *Vesey*, 89.]

Depositions, in a former cause in *Chancery*, admitted to be read, upon motion, the same matter being then under examination, as now. *Ca. Ch.* 73. 175.

Tho' neither the plaintiff, nor any under whom he claims, was party to the former cause. *R. Ca. Ch.* 73 — *Cont. at Law*, 2 *Rel.* 679. l. 35.

Tho' neither the plaintiff, nor the defendant, was then a party. *Ca. Ch.* 73. *Cont.* 1 *Ver.* 431.

And tho' the former cause was more than 30 years past, and the witnesses dead. *Ca. Ch.* 73.

So, depositions in a cause dismissed for want of equity for relief. *Ca. Ch.* 175.

So, depositions for a legatee against an executor, to prove assets, in a bill brought by another legatee for the same intent. 1 *Ver.* 413.

[A decree in a former cause wherein the then lessee, and not the impropiator, was plaintiff, and the then tenants were defendants, admitted as evidence. *Bishop Lincoln v. Ellis*, *T.* 1722, *Bunb.* 110.]

[If, on a bill brought by devisees to establish a will, the heir at law prevails to set it aside, he shall have the benefit of the depositions in that cause, in another brought by him against a purchaser before the answers came in in the former. *Grath v. Ward*, *P.* 1741, 2 *Atkyns*, 174.]

And if the plaintiff or defendant obtains an order for the use of depositions in another cause, the adverse party may use them, without motion, unless he be inhibited by the same order. *Ord. per Cla. Rules and Orders of Chancery*, 109.

[Depositions in a former cause for a *modus*, where the impropiator had not answered, nor the vicar replied, cannot be read. *Baker v. Sweet*, in *Sc. M.* 1721, *Bunb.* 91.]

[A decree

[A decree (in a tithe cause) cannot be read unless proved to be touching the same lands or title. *Benson v. Olive*, T. 1730, *Bunb.* 284.]

[A verdict between the same parties, obtained since issue joined in equity, cannot be read, unless proved to be touching the same lands. *Ibid.*]

But when the former cause was dismissed for irregularity, the depositions therein can never be admitted in another cause for the same matter; for the former cause never was regularly in court. *R. Ca. Ch.* 175.

So, a bill exhibited by the defendant against the plaintiff at another time, shall be read, upon proof, that it was exhibited with his privacy. *Ca. Ch.* 65.

[In a cause against a bankrupt and another, the plaintiff cannot read the examination of that other before the commissioners under the bankruptcy, unless it is proved in the cause that such examinations were taken before the commissioners. *Eade v. Lingwood*, P. 1747, 1 *Atkyns*, 203.]

[The examination of defendant's attorney before commissioners of bankrupt, to prove a fraud, cannot be read, unless he has been examined in chief in the cause. *Hamond v. Myers*, H. 1746, 3 *Atkyns*, 415.]

[But the examination of defendant before commissioners may be read, if he has set up a different right by his answer, to shew the inconsistency. *Ibid.*]

[In the *Exchequer*, the court will sometimes refuse to give leave on motion to read the decree and depositions in a former cause, saving just exceptions, tho' a motion of course in *Chancery*; for *there*, having only one judge, he may disallow them if he sees just exception; but *here*, having four judges, if they should be equally divided in opinion, they must then be read whatever reason might be to the contrary, for no just exception could appear. *Bishop Hereford v. Cooper*, M. 1730, *Bunb.* 293.]

(T 6.) *The defendant's answer.*] So, the answer of the defendant may be read against him; but then the whole may be read by the other party.

So, if a defendant, being an infant, answers by guardian, and at full age neither amends or makes a new answer, as he may do, but prays a hearing of the cause *de novo*, his answer shall be evidence against him. *Eq. R.* 4.

[If the plaintiff is charged by an answer, he must discharge himself by proof, and cannot do it by reading the whole answer. *Parteniche v. Poulet*, T. 1742, 2 *Atkyns*, 383.]

[Defendant's answer in another cause may be read, to shew that a deed in question once existed. *Whitfield v. Fauisset*, H. 1749, 1 *Vesey*, 387.]

[The answer of two defendants, arbitrators, may be read against a third, party to the award. *Mullins v. Symonds*, P. 1725, *Bunb.* 196.]

[The answer of a defendant disclaiming all right to an estate, and not brought to hearing, shall be read against another defendant. *Hill v. Adams*, P. 1740, 2 *Atkyns*, 39.]

[Defendant is not bound by an admission of a consequence in law,

or a consequence in equity, for the court is judge of it. *Pearce v. Grove*, T. 1747, 3 *Atkyns*, 522.]

If the defendant by his answer denies an agreement, &c. it ought to be proved by two witnesses, for one is not sufficient. 2 *Ca. Ch.* 8. 1 *Ver.* 161.

[If defendant's answer is equally strong with the deposition of one witness, there can be no decree against him, but if concurring circumstances support the deposition, there may. *Walton v. Hobbs*, M. 1739, 2 *Atkyns*, 19. *Janson v. Rany*, H. 1740, 2 *Atkyns*, 140. *Only v. Walker*, T. 1746, 3 *Atkyns*, 407. *Vide* 1 *Bro. Ch. Rep.* 52. See also *Mortimer v. Orchard*, 2 *Ves. jun.* 244.]

[If the denial of defendant by his answer is not clear, positive, and full to the fact, the court will decree on the testimony of one witness. *Le Neve v. Le Neve*, M. 1748, 3 *Atkyns*, 646. 1 *Vesey*, 64.]

(T 7.) *Deeds.*] A deed, mentioned in the bill, to which the defendant says, *he believes there is such a deed*, shall not be read, without proof; for the confession does not admit more than is alleged by the bill, and does not warrant the reading of a deed with like clauses. R. 2 *Vent.* 161.

[The probate of a will may not be read in case of a real estate, tho' defendant has admitted he believes there is such a will; otherwise, if his admission had been full. *Mullins v. Pratt*, in Sc. T. 1716, *Bunb.* 6.]

So, a deed proved upon a commission against one defendant only, shall not be admitted against the other defendant. 2 *Vent.* 361.

[A deed 40 years old, without proof, or shewing where or how they came by it. *Benson v. Olive*, T. 1730, *Bunb.* 284.]

[But not a deed of 35 years old, in general, tho' sometimes. *Ibid.*]

[An ancient copy of a bargain and sale inrolled at the chapel of the rolls, attested by five witnesses, or even without attestation, is good. *Harvey v. Philips*, P. 1743, 2 *Atkyns*, 541.]

[If defendant by answer in another cause has admitted that a deed in question, a release, once existed, and defendant has the lease belonging to this release, plaintiff may read the draught of the release, if well proved. *Whitfield v. Fauisset*, H. 1749, 1 *Vesey*, 387.]

[A counterpart may be read, if the original deed is lost; if no counterpart, a copy; if no copy, parol evidence how it was lost. *Villiers v. Villiers*, M. 1740, 2 *Atkyns*, 71.]

[The book of impropriator's predecessor admitted as evidence of a mortuary. *Anon.* in Sc. T. 1719, *Bunb.* 46.]

[Ministers' accounts, tho' subsequent to 31 H. 8. may be read in a tithe cause. *Benson v. Olive*, T. 1730, *Bunb.* 284.]

[Entries in the accounts of the lord's steward, admitted to prove a *modus* to the vicar, in discharge against the impropriator the plaintiff. *Woodnoth v. Lord Cobham*, M. 1724, *Bunb.* 180.]

[A bailiff's accounts have been admitted as evidence of quit-rents. *Sed. 2.* as to a lord of a manor's books. *Anon.* T. 1719, *Bunb.* 46.]

[That an account may be evidence for quit-rents, it must appear to be a bailiff's, and signed by him. *Franks v. Carry*, H. 1740, 2 *Atkyns*, 140.]

[An entry in a man's book of accounts, may, on a reference to a master, be read, not as evidence of the debt, but of a claim of it in

in the lifetime of the deceased. *Lefebure v. Worden*, M. 1750, 2 *Ves.* 54.]

[Letters or books of an agent or servant may be read if he is dead, otherwise not. *Peacock v. Monk*, H. 1750, 2 *Ves.* 190.]

[So, a *feme-covert* having a separate estate, and giving bond, her declarations may be read. *Ibid.*]

[An inquisition of lunacy, and other inquisitions, may be read, but are not conclusive evidence, for they may be traversed. *Sergefon v. Sealey*, M. 1742, 2 *Atkyns*, 412.]

[The customs of neighbouring manors may be admitted to shew the custom of the manor in question, in mine countries and fen countries, where there is a similitude. *Dean of Ely v. Warren*, T. 1741, 2 *Atkyns*, 189.]

[A certificate of an original agreement between rector and vicar from the abbot of a foreign abbey, cannot be read, if it does not appear that it came out of the charter-house of the abbot, or that he is the proper officer to keep the records. *Carte v. Ball*, P. 1747, 3 *Atkyns*, 496.]

[Items in a partnership account relating to the particular interest of the book-keeper, will not be supported. *Smith v. D. Chandos*, P. 1741, 2 *Atkyns*, 159.]

[If a bond, &c. has been delivered up to plaintiff, he cannot read parol evidence to the contents of it, whether the bill is to be relieved against it, or whether it comes in by way of collateral evidence. *Cole v. Gibson*, T. 1750, 1 *Ves.* 503.]

[A list of bank-notes in testator's hand-writing, some marked as received, others as not received, cannot be read in evidence, tho' many years have elapsed without any demand on the unreceived notes, which are supposed to be lost. *Glyn v. Bank of England*, M. 1750, 2 *Ves.* 38.]

[Exhibits proved *vivâ voce* at the hearing, cannot be read where there is a right to controvert, or to a cross-examination. *E. Pomfret v. Id. Windsor*, T. 1752, 2 *Ves.* 472.]

[A deed may be proved *vivâ voce* at the hearing, but not a will. *Harris v. Ingledew*, H. 1730, 3 *P. W.* 91.]

[A will of a real estate shall not be proved as an exhibit. *Niblett v. Daniel*, M. 1731, *Bunb.* 310.]

[The court will order public books (as of a manor court) to be produced, in whatever hands they are, but not private. *Anon.* T. 1754, 2 *Ves.* 578.]

[An executor who was counsel and drew the draught of an annuity, to set aside which a bill is brought, shall be obliged to leave the draught with his clerk in court, but not on oath. *Stanhope v. Roberts*, M. 1741, 2 *Atkyns*, 214.]

[A corporation, as trustees for a charity, shall not be obliged to produce their books relating to the trust, tho' they submitted by their answer to produce as the court should direct. *Attorney-General v. City of Coventry*, M. 1730, *Bunb.* 290.]

[If defendant's witness proves a deed, and refers to it, yet plaintiff cannot compel him to produce it. *Hodgson v. E. Warrington*, H. 1729, 3 *P. W.* 35.]

[Parol evidence cannot, in general, be admitted to supply a circumstance in a deed or will; as, where a legacy was given to a person, who

who was dead at the time, his executors, administrators, and assigns, parol evidence to shew that the testator knew the person was dead, and that he meant the legacy should go to the executors or administrators cannot be admitted. 1 *Brown. Ch. R.* 85.]

[But where a person in existence was described by a name not his real one, but one by which the testator used to call him, evidence may be admitted to shew whom the testator meant. *Id. ibid.* 1 *Ves.* 232.]

[On a grant of an annuity, a bill was filed to redeem, on a suggestion that it was part of the original agreement, but omitted in the deed, from an apprehension that it would make the transaction usurious: parol evidence was offered to prove it was part of the original agreement; but it was refused to be admitted, the bill not stating the omission to have been by fraud. 1 *Brown. Ch. Rep.* 92.]

[But where there is an ambiguity in the words of an instrument, parol evidence, which goes to shew that the words taken down in writing are contrary to the concurrent intention of all parties, cannot be rejected as incompetent, as where it appears doubtful whether a party to a settlement had notice of a prior incumbrance, the parol evidence of the attorney may be admitted to prove it. *Id.* 340.]

[So, evidence of the state of a testatrix's property may be let in to shew that by a gift of a sum in *long annuities*, she meant a gross sum, not an equivalent annuity. *Id.* 472.]

(V) Interlocutory Orders.

• THE orders made by the court upon hearing are interlocutory, or final and decretal. *Vide Pract. Reg. in Chan.* 253.

The interlocutory (which comprehend all orders made by the court before the decree) shall not be explained by petition, but by motion upon notice to the other party. *Vide Pract. Reg. in Chan.* 255.

[An interlocutory order, or even a decree, if gained by collusion, may be set aside on petition. *Sheldon v. Fortescue*, A. P. 1731, 3 *P. W.* 104.]

[An order on a petition made on hearing counsel on both sides, is not discharged on motion; on a petition *ex parte*, it is. *Bishop v. Willes*, M. 1750, 2 *Ves.* 113.]

[The court can make an order in the nature of a decree, on motion or petition, with consent of all parties, but not for sale or mortgage of a term, to be a charge on the inheritance of an infant plaintiff. *Beard v. Powis*, T. 1751, 2 *Ves.* 399.]

[Yet, on plaintiff's affirming their consent to a petition, (tho' the cause is abated by the infant plaintiff's marriage with defendant, and not revived,) the court will declare it will not restrain trustees from raising and paying. *Ibid.*]

An order made without mention of a former order, concerning the same matter, is surreptitious, and shall not be used. *Vide Pract. Reg. in Chan.* 256.

Nor, shall it be entred after the 8th day from the pronouncing it, exclusive. *Vide Pract. Reg. in Chan.* 256. *Vide*, for the entry, *ante*, (B 6.) The

The consent of the solicitor to an interlocutory order is sufficient. *Ca. Ch.* 86.

In the *Exchequer*, after judgment upon an hearing, or rule upon a motion pronounced, the minutes ought to be repeated openly in court, before the hearing of another cause, on motion, to the intent that any mistake may be rectified. *Rules and Orders in Exchequer*, 12. *Rule* 30.

[An order that a cause shall stand over indefinitely, does not imply, that it is put off only to next term. *P.* 1737, 2 *Atkyns*, 2.]

[If there is a variation between the original will and the probate, the cause must stand over, and the parties may apply to the spiritual court for amendment. *Marsh v. Howe*, *T.* 1740, 2 *Atkyns*, 50.]

[The court never orders any thing to be pulled down on motion, rarely on decree. *Ryder v. Bentham*, *T.* 1750, 1 *Ves.* 543.]

[Decretal order cannot be discharged on motion, tho' by consent, and tho' surprise be alleged. *Anon.* 1 *Ves. jun.* 93.]

[A final decree cannot be made on an interlocutory order without consent. *Allan v. Bowyer*, 3 *Bro. C. C.* 149.]

[Question of intention of a will to be determined by the court, not by the master. *Pitt v. Ld. Camelford*, 1 *Ves. jun.* 83. 3 *Bro. C. C.* 160. *S. C.*]

[Devisee of stock for life, with absolute power of appointment, if no children; reference to the master to inquire what became of a child she had, circumstances of suspicion appearing. *Sculthorp v. Burges*, 1 *Ves. jun.* 91.]

(W I.) Reference to a Master.

WHEN the court would be informed of any fact, it is usually referred to a master; as, to examine the sufficiency of an answer. *Vide Rules and Orders in Chancery*, 119. *Vide Pract. Reg. in Chan.* 305, 6.

To take accounts. *Vide Pract. Reg. in Chan.* 305.

[To examine into impertinence or scandal.]

[A bill cannot be referred for impertinence after answer, or even submitting to answer, as by praying time, &c. 2 *Ver.* 631.]

[For scandal, the old rule was that a bill might be preferred at any time. *Vide* 2 *Ver.* 24. 631. *Bunb.* 304. But it has been since held that, by answering, defendant waived any objection, and ought not afterwards to procure the bill to be altered, and made a new one. 2 *P. W.* 311. 2 *Eq. Ab.* 69.]

[There is no established rule within what time an answer may be referred for impertinence. Lord *Hardwicke* discharged an order of reference for impertinence of an answer, after plaintiff had lain by some time. 2 *Ver.* 631. Lord *Thurlow* refused to discharge such an order. 1 *Brown. Ch. Rep.* 400.]

[A party may have the affidavit of his own solicitor referred for impertinence. *Philips v. Philips*, *M.* 1746, 3 *Atkyns*, 391.]

[If defendant pleads a decree of dismissal of a former cause for the same matters, in bar to plaintiff's demand on his new bill, if plaintiff does not apply to refer to a master to state whether there is such decree, but sets down the cause for hearing, it is a waiver

of his right of application for such reference, and the court will determine it. *Morgan v. Morgan*, H. 1738, 1 *Atkyns*, 53.]

[The court will not make an order for a master to admit depositions in a former cause between the same parties to be read, for he may judge if they are proper, and if he is mistaken, you may except. *Anon. T. 1747*, 3 *Atk.* 524.]

[Reservation of further directions does not reserve interest which ought to be expressly directed by the decree to be reserved; but after direction of trial at law, reservation of general directions includes costs, interest, &c. *Champ v. Moody*, T. 1752, 2 *Ves.* 470.]

But a reference of the state of the case is not frequent, without consent of the parties. *Vide Pract. Reg. in Chan.* 306.

Nor, a reference to determine the cause, except where the parties are poor, or of kin, or do consent. *Ibid.*

Nor, a reference to take accounts, till the hearing of the cause. *Vide Pract. Reg. in Chan.* 307. 309.

A reference to examine court-rolls is made to two masters. *Vide Pract. Reg. in Chan.* 307.

[Where the matter of a cause has been referred to arbitration, it cannot come on upon exceptions to the award, but upon further directions. 1 *Brown. Ch. Rep.* 398.]

[The court will compel witnesses (tho' strangers) to attend. *Shorter v. Scortin*, T. 10 G. *Bunb.* 169.]

[A party once examined may be examined again on new interrogatories to the same matter without an order, the master being judge; but a witness may not, without order. *Cowslade v. Cornish*, P. 1751, 2 *Ves.* 270.]

[A master may proceed *ex parte* without order, if the other party does not attend. *Ex parte Bax*, T. 1751, 2 *Ves.* 388.]

[Where a matter has been referred to a master, and the reference was sufficiently large to have admitted a report whether the plaintiffs were a testator's natural children, and no notice is taken of that circumstance in the report, nor any exception taken on that account, no further reference will be made to the master for the purpose of such an inquiry, because if new references were to take place, whenever parties wished to bring forward fresh facts, it would lead to inconvenience, and would be doing on a re-hearing what would be the proper subject of a bill of review, where the parties must swear the fact was not in their knowledge, at the filing of the former bill. 1 *Brown. Ch. Rep.* 426.]

(W 2.) Report.

The report or certificate of the master ought to be succinct and plain, without recital of all the points of the order of reference, or the debates of the counsel upon which it was founded. *Ord. per Cla. Rules and Orders of Chancery*, 118. *Vide Pract. Reg. in Chan.* 320.

The master usually delivers his opinion in the report, if the case be not difficult. *Vide Pract. Reg. in Chan.* 319.

And if it be difficult, he shall make a special report; but that shall not be upon the importunity of counsel, but only when the court, or the intricacy of the case, in his judgment, requires it. *Ord. per*

per Cla. Rules and Orders of Chancery, 118. Vide Pract. Reg. in Chan. 319, 320.

[Masters' special reports shall not set forth the evidence and their opinion on it, but only state the bare matter of fact. *Dff. Marlbro' v. Wheat, H. 1737, 1 Atkyns, 454.*]

The report ought not to exceed the order of reference. *Vide Pract. Reg. in Chan. 320.*

[Under a decree to account, the master may state *special matter*, tho' there is no direction so to do. *Anon. T. 1743, 2 Atkyns, 621.*]

It shall be made upon consideration of the whole answer, or matter referred, that thereby the court may be fully informed. *Ord. per Cla. Rules and Orders of Chancery, 119. Vide Pract. Reg. in Chan. 320.*

As, if it be referred, whether such a thing be confessed or alleged by the answer, the master shall also consider, how such confession is balanced or avoided, by another part of the answer. *Ibid.*

[Before report the court refused to order balance of charges allowed against the defendant on account, and the whole alleged in his discharge, to be paid into court on certificate by the master, and defendant's examination before him: but also refused to take the certificate off the file. *Fox v. Mackreth, 1 Ves. jun. 69.*]

[No certificate by a master, as by the Accountant-General, but there must be a report in order to the court's taking notice of any thing in the master's office. *Ibid. 70.*]

[Where a surplus to be distributed from time to time is an uncertain sum, the master ought to report the shares in aliquot parts, not in money. *Attorney-General v. Haberdashers' Company, 1 Ves. jun. 295.*]

After the report is made, it shall be filed with the register, under the hand of the master, and then confirmed by the court, unless cause is shewn to the contrary, within seven days, by the other side. *Vide Pract. Reg. in Chan. 323.*

If cause is not shewn, it shall be confirmed absolutely.

[If a report is confirmed *nisi*, and by the register's minutes at a subsequent seal in the same cause, it is taken down *order absolute*; but never entred; the court will not order it to be entred *nunc pro tunc*, unless on recent application, on a motion of course; after length of time there must be notice. *Anon T. 1747, 3 Atkyns, 521.*]

Yet, a report being positive, and not to ground a decree, shall be of force, and process shall be awarded immediately for the performance, unless the other party, upon notice, files exceptions to it with the register within eight days in term-time, or in the seals, or if it be after the seals, within four days of the next term. *Ord. per Cla. Rules and Orders of Chancery, 120. Vide Pract. Reg. in Chan. 323.*

By order 29 Oct. 4 W. & M. reports shall be filed with the register, within four days after signing, who shall indorse the day of filing; and all proceedings thereon before filing shall be void. *Rules and Orders of Chancery, 189. Vide Pract. Reg. in Chan. 321.*

In the Exchequer, a report ought to be delivered six days before the time fixt for the hearing of the cause, to the clerk in the cause, who shall

shall forthwith give notice thereof to the clerk on the other side. *Vide Rules and Orders in Exchequer*, 14. *Rule 36.*

[Order nisi to confirm the master's report for the purpose of compelling *A.*, reported the highest bidder, to complete his purchase, afterwards made absolute, no cause being shewn. *Cunningham v. Williams*, *Anstr.* 344. *Vid. Practice.*]

(W 3.) Exceptions to the Report.

If exceptions are taken to the report, they ought to be filed with the register within eight days after the report filed, if it be within the term or the seals. *Vide Rules and Orders of Chancery*, 120. *Vide Pract. Reg. in Chan.* 323.—In the *Exchequer*, two days before the hearing of the cause. *Rules and Orders in Exchequer*, 14. *Rule 36.*

If in the vacation, within four days of the next term. *Vide Rules and Orders of Chancery*, 120. *Vide Pract. Reg. in Chan.* 323.

And he, who files the exceptions, shall deposit 40 s. (marginal note of *Clar. Ord.* is 5 l., and so is *Pract. Reg. in Chan.* 169.) with the register to be paid to the other party, with other costs as the court shall think proper, if they are disallowed. *Ord. per Cla. Rules and Orders of Chancery*, 120.

If they are disallowed, the 40 s. shall be returned. *Ord. per Cla. Rules and Orders of Chancery*, 120, 121.

So, if any one exception is allowed; as, when the master reports an answer insufficient in several particulars, and the exceptant prevails in some particular, which is not insufficient in it, the 40 s. shall be returned. *Per Cowper, H. 4 Anne.*

But by *Rule 12 Feb. 1676*, the exceptant shall pay 10 s. over the 40 s. for every exception, or distinct part of an exception over-ruled. Confirmed by *Rule 30 Apr. 2 J. 2. Rules and Orders of Chancery*, 142. 168.

[Where the exceptant prevails in any of his exceptions, he is entitled to the deposit. *Parker v. Prout*, *T. 32 Geo. 3. 4 Br. Ch. Rep.* 1.]

[Objections to the master's report put in an hour before the time limited for his signing it. He signed it notwithstanding the report was confirmed. *Anon. 1 Anstr.* 277.]

And by order 17 January, 1 *W. & M.* tho' the exception be waived; and if the exception is declared to be frivolous and impertinent, he shall pay for it 20 s. *Rules and Orders of Chancery*, 186. *Vide Pract. Reg. in Chan.* 169.

The register shall enter the exceptions in course, to be determined by the court. *Ord. per Cla. Vide Rules and Orders in Chancery*, 120. *Vide Pract. Reg. in Chan.* 325.

And the paper of the day shall be set up by the register in his office for two days before. *Ord. per Cla. Rules and Orders of Chancery*, 120. *Vide Pract. Reg. in Chan.* 325, 6.

And notice of the day shall be given by the exceptant to the other party. *Ord. per Cla. Rules and Orders of Chancery*, 120. *Vide Pract. Reg. in Chan.* 325.

[If a bill is referred for impertinence, and the master's report is pertinent, the defendant may except generally, and go upon it without

without pointing out the particular impertinence by the exception. *Mackworth v. Briggs*, P. 1741, 2 *Atkyns*, 182.]

[No matter not objected to before the master, shall be gone into. *Huse v. Laves*, in Sc. M. 1721, *Bunb.* 93. *Ex parte Bax*, T. 1751, 2 *Ves.* 388.]

[If a matter varies his report on objections, the party may take exceptions without other objections. *Ex parte Bax*, T. 1751, 2 *Ves.* 388.]

[A party may obtain leave to file an exception, tho' the master was attended by his solicitor, who made no objection, and tho' conveyances have been drawn and executed in consequence of the master's approbation in his report. *Baskerville v. Baskerville*, H. 1741, 2 *Atkyns*, 279.]

[If the error in the master's report is owing to the exceptant's not laying a material evidence before him, the court will not order him to review his report, but on the exceptant's giving up his deposit. *Hodges v. Cardonel*, T. 1742, 2 *Atkyns*, 408.]

[After exceptions argued, and the report confirmed, the court will not order the master to review his report; but errors in computation merely, may be set right at any time. *Hawkins v. Day*, M. 1748, 1 *Ves.* 189.]

[If a report is confirmed without exception or objection, the court will not open it on a point of form, if material justice is done; tho' a lunatic is interested. *E. Bath v. E. Bradford*, T. 1754, 2 *Ves.* 587.]

(W 4.) Final References.

Sometimes the court refers a cause to a master, or others, to be determined by their award. *Vide Pract. Reg. in Chan.* 306.

But such reference is made by the consent of all parties. *Ca. Ch.* 86.

And the consent of the solicitor is not sufficient. *R. Ca. Ch.* 86, 87.

Nor, is it sufficient that any party attends upon the reference, unless he does actually consent. *Ca. Ch.* 87.

But the solicitor, who consents, shall not pay costs, tho' the award was made upon his consent, and afterwards reversed for that reason; for his consent was void, and it was the folly of the other side to proceed upon it. *Ibid.*

And tho' such an award be afterwards affirmed by a decree, it shall be reversed upon a review, if it does not appear to have been made by the consent of all parties. *R. Ca. Ch.* 86, 87.

So, if the award be of only part of the matters referred. *R. Ca. Ch.* 87.

Or, impossible or repugnant. *R. Ca. Ch.* 87.

(X) Trial by Common Law.

Sometimes the court refers the matter to a trial by the common law, upon an issue by them directed. *Vide Pract. Reg. in Chan.* 223.

As, if it be doubtful whether the plaintiff, who sues as admini-

stratrix to her husband, has her husband living or not. *R. Ca. Ch.* 50.

[If a man and woman deny their marriage by their answer, it shall be left to a jury. *Revel v. Fox*, *P.* 1751, 2 *Ves.* 269.]

In a bill for a legacy, &c. if the defendant controverts the will, it ought not to be established by a decree, before a trial at law of the validity of the will. *R. inter Cook and Parsons*, 6 Feb. 13 *W.* 3. and a decree *per Finch cont. reversed.* *R. Eq. Ca.* 90. (2d part of 2 *Mod. Ca.*)

[On an issue directed to try the validity of a will, the court may give special directions to know, if the jury finds against it, whether it is for forgery or defect in the execution. *Barnsley v. Powell*, *T.* 1748, 1 *Ves.* 119.]

Or, if it is doubtful, whether a prior mortgage is executed or satisfied. *Eq. Ca.* 39.

So, if a fact be controverted, a trial is usually directed; as, whether there is such a custom, prescription, &c. *Vide* 1 *Ver.* 489.

[Granted on a bill against a judgment by default, on a *South-Sea* contract, to try if defendant was possessed of stock. *Anstruther v. Christie*, *T.* 1724, *Bunb.* 178.]

[On a bill for tithe of fish by custom, tho' there was a former decree establishing the custom, signed by 130 parishioners, and no evidence by defendants against it. *Graveaves v. Kelynox*, *T.* 1727, *Bunb.* 239.]

[The court may direct an issue to try a *modus*, tho' the evidence varies a little from the bill. *Laitkes v. Christian*, *M.* 1734, *Bunb.* 340.]

[If on a bill for tythes a *modus* is set up, and it is admitted by the parson, that there have been such customary payments time immemorial; but he insists the *modus* is void, as unreasonable, uncertain, &c. the court will not over-rule the *modus* without directing an issue. *Hardcastle v. Smithson*, *T.* 1745, 3 *Atkyns*, 245.]

[The court will order a trial *on motion*, if it is agreed that the point must be tried; as, whether defendant has a right to build, whereby plaintiff's lights are obstructed, *Ryder v. Bentham*, *T.* 1750, 1 *Ves.* 543.]

Whether a judgment, bond, debt, &c. be satisfied. *Ch. R.* 3.

So, the court sometimes directs a trial of a fact, which gives a right, tho' it was in issue before, upon a commission to examine witnesses. 2 *Ca. Ch.* 3.

So, if the question in issue be, whether there was an agreement, the court may direct a trial thereupon, whether the agreement was waived. *R.* 2 *Ca. Ch.* 40.

So, there shall not be a decree to bind the inheritance generally, without two trials if the parties desire it. *Vide* 1 *Ver.* 293.

So, if the matter be of value, a second trial shall be directed. *R.* 2 *Ver.* 75.

[There must be an original motion for a new trial, for the court will not answer a petition for it when the cause comes on, upon the equity reserved. *Attorney-General v. Montgomery*, *T.* 1742, 2 *Atkyns*, 378.]

[New trial will not be granted, unless the application be recent, even tho' the equity reserved has not been set down sooner, for the party

party wanting it should have set it down. *Legard v. Daly, H. 1748, 1 Vef. 192.*

[After issue directed, and trial had, the court will not direct a new trial, because the verdict gives defendant more than he claimed by his answer, nor on pretence of surprise, if plaintiff opposed putting off the trial, nor because one of the plaintiffs is an infant, nor because one of defendant's ancestors was attainted, (which gives right to the king but not to plaintiff,) tho' the thing in dispute is land of great value. *Ibid.*]

[If there have been two trials, the last at bar, the court will suffer that to prevail, and not grant a new trial. *Attorney-General v. Montgomery, T. 1742, 2 Atkyns, 378.*]

But after a plea to a bond, *quod solvit ad diem*, if the defendant in Chancery suggests that the bond was not executed, or that it was obtained by fraud, Chancery may well order payment of the bond, without directing a trial of the validity of it, which was admitted by the defendant's plea upon the suit at common law. *R. in Parl. Ca. Parl. 16.*

So, if the defendant by fraud suppresses a deed, the court will make a decree, without directing a trial. *Ca. Ch. 293.*

So, a trial seems to be in the discretion of the court.

So, the court may direct a special issue; or, if there is no impediment, put the party to his action at law. *2 Ver. 503.*

[The court may send a case to be argued before two judges at their chambers. *Rigden v. Vallier, H. 1741, 3 Atkyns, 731.*]

When a trial shall be enforced upon an original bill. *Vide post. (4 V).*

[Bill for discovery, injunction, and delivery of a bill of exchange; on the answers, and evidence, the right being clear, the court refused a trial of it at law, and decreed an immediate delivery. *Newman v. Milner, 2 Vef. jun. 483.*]

[The court will not direct an issue on motion. In *Exchequer, Anon. 2 Anstr. 480.* But see *contra, Attorney-General v. Lane, ibid. 589.*]

[Issue ordered to discover a witness's interest. *Stokes v. M'Kerral, at the Rolls, 3 Bro. C. C. 228.*]

(Y 1.) Decree.

A Decree by the court shall be drawn with convenient brevity, reciting only the substance of the proceedings briefly. *Vide Pract. Reg. in Chan. 127.* So, in the *Exchequer. Rules and Orders in Exchequer, 12. Rule 32.*

If it be made by the master of the rolls, or a judge, it shall be signed by them, and afterwards by the chancellor or keeper. *Vide Pract. Reg. in Chan. 123. 127.*

And before it is presented to them to be signed, it shall be signed by the fix-clerk, to whom it belongs, or his deputy. *Ord. per Cla. Rules and Orders of Chancery, 117. Vide Pract. Reg. in Chan. 123.*

And the fix-clerks are to keep a public book of all decrees made and signed; and therefore the register, at the beginning of every term, shall give them a list of all the decrees and dismissals signed

by the chancellor, in the term of vacation precedent. *Ord. per Cla. Rules and Orders of Chancery*, 117.

Every decree shall be drawn, signed, and inrolled before the first day after the *Michaelmas* or *Easter* term next ensuing the pronouncing of it. *Ord. per Cla. Rules and Orders of Chancery*, 116. *Vide Pract. Reg. in Chan.* 123.

And shall not be afterwards signed and inrolled, without leave of the court. *Ord. per Cla. Rules and Orders of Chancery*, 116, 117. *Vide Pract. Reg. in Chan.* 124.

[A caveat may be entred against inrolling a decree without assigning reason, which stops it for a month. *Anon. M.* 1749, 1 *Vej.* 326.]

[The court will vacate the inrolment of a decree, tho' strictly regular, if it is extremely quick, and it appears the other party intended to enter caveat, but came too late by mistaking the place. Thus courts of law set aside judgments, as on surprise, tho' strictly regular. *Ibid.*]

[The court never suffers a decree to account to be signed and inrolled, because it would tie up their hands if there should be any defect in the directions. *Staunton v. Oldham*, T. 1742, 2 *Atkyns*, 383.]

So, in the *Exchequer* a decree of dismissal shall not be entred after the last day of the next term, without leave of the court, upon motion. *Rules and Orders in Exchequer*, 12. Rule 31.

In *Chancery*, it may be inrolled after the death of the defendant. 2 *Ch. Ca.* 227.

So, if a guardian is decreed to pay money, having confessed assets, he shall be bound, tho' the infant dies before the inrolment. 2 *Ch. Ca.* 199.

If the decree concerns land, or a lease, it shall be entred in the docket of the register, within six months; otherwise, a purchaser shall not be prejudiced by it. *Vide Pract. Reg. in Chan.* 128.

It ought to recite the facts, which are agreed or proved; otherwise a bill of review would be prevented. 1 *Ver.* 214.

If a decree be for relief against a judgment in another court, the judgment shall first be read, and then the decree does not vacate the judgment, but corrects the unreasonable part. *Vide post.* (3 W). *Vide Pract. Reg. in Chan.* 127, 8.

[In a second cause between the same parties, the court will not make an inconsistent decree, because it would create confusion; but will direct the cause to stand over, that plaintiff may lay the matter before the court, by bill of review or otherwise. *Shepherd v. Titley*, T. 1742, 2 *Atkyns*, 348.]

[Acquiescence under a decree of dismissal in a former cause may be insisted on, unless it was *without prejudice* to the present question. *Ibid.*]

[If a bill is brought, and decree made in *Wales*, and an appeal to the lords who affirm, and defendant, to avoid execution flies into *England*, an original decree may be had here on a bill stating all the facts. *Semb. Morgan v. — M.* 1737, 1 *Atkyns*, 408.]

[If any matter is reserved at the hearing till after the master's report, the court will not determine it on motion, but it must be set

set down on the equity reserved. *Cooke v. Gawyn, M. 1748, 3 Atkyns, 689.*]

[But it will grant a receiver on motion, notwithstanding such reservation. *Ibid.*]

[If plaintiff is entitled to relief against defendants, *A. and B.*, and *A.* is decreed to pay plaintiff, the court will give *A.* leave to prosecute the decree against *B.* *Walker v. Preswick, T. 1755, 2 Vesey, 622.*]

[In a suit where the attorney-general, a party, leaves it to the court to make a decree, so as not to prejudice the rights of the crown, the court will decree with a *salvo jure* to the crown, and also give leave to the parties to resort back, if the execution is by act or right of the crown obstructed, *Penn v. Ld. Baltimore, P. 1750, 1 Vesey, 444.*]

[When a cause comes on after the *poslea* returned, upon the equity reserved, the decree is always absolute. *Geale v. Winter, in Sc. P. 1719, Bunb. 40.*]

If a decree be by the consent of counsel, and no other cause appears for it, it shall be reversed; for consent of counsel is not sufficient ground for a decree. *1 Ver. 274.*

By a privy seal, the chancellor, or keeper, may sign and enrol a decree of his predecessor. *1 Ver. 132.*

(Y 2.) Who are bound by a Decree.

All parties and privies are bound by a decree.

So, a purchaser after the decree. *Ca. Ch. 231. 1 Ver. 459.*

So, a purchaser *pendente lite*. *Ca. Ch. 152. 1 Ver. 459, 460.*

So, a decree for foreclosure of a redemption against a tenant in tail binds his issue. *Ca. Ch. 220.*

So, it binds the remainder-man, who claims by a voluntary settlement of the tenant in tail, altho' no party to the decree. *Semb. Ca. Ch. 220.*

So, if a person, present at the pronouncing of a decree, pays money to an executor contrary to the decree, though he was no party to the suit, nor served with an order for the non-payment, he shall be bound by the decree. *R. 1 Ver. 57. 123.*

So, if four parishioners are named to defend for all, and there is decree against them; another parishioner, not party or privy to those four defendants, shall be bound by the decree. *Ca. Ch. 272. 282.*

If the lord of a manor is decreed to admit copyholders upon a fine certain; a copyholder, not a party, shall take advantage of the decree. *Hard. 169.*

(Y 3.) Who not.

But a purchaser *bona fide* before the bill exhibited, not being a party by the bill, nor by order, shall not be bound by the decree. *Vide Pract. Reg. in Chan. 125, 6.*

Nor, any one, who does not appear *gratis*, nor was served with process *ad audiendum judicium*. *Vide Pract. Reg. in Chan. 125.*

Nor, any one who has an interest, and is not party or privy. *R. Ca. Ch. 48.*

[Copyholders in fee, or freeholders for life, not parties, are not bound by a decree against the lord of the manor. *Poore v. Clerk, H. 1742, 2 Atkyns, 515.*]

So,

So, if one defendant is in contempt to a sequestration, and a decree is made against other defendants; that does not bind the defendant in contempt, but he may afterwards appear, and answer, and have the cause heard. 1 Ver. 228.

A decree in *Chancery* does not bind the right, but only the person. *Vide ante* (D 7). *Vide Ca. Ch.* 301.

(Y 4.) Execution of a Decree.

After a decree made, the defendant ought to be served with it, under the seal of the court.

And in the *Exchequer*, no person shall be in contempt, for not performing an order or decree, until he is served by delivery of a true copy to him, and shewing him the order or decree under the seal of the court. *Rules and Orders of Exchequer*, 14. Rule 35.

Or, if he cannot be found to be served personally, upon an *affidavit* thereof, by order of court, a writ of execution may be left at his house or last abode, or a copy shall be left with his clerk in court. *Ibid.*

In *Chancery*, if the defendant, being served with the decree, does not pay obedience to it, all the process for contempt shall issue against him successively. *Vide* what they are, *ante*, (D 3, &c.) *Vide Pract. Reg. in Chan.* 174.

[If defendant is in custody on an attachment, sequestration shall not issue till return of attachment, and then if he does not obey, it may issue against his land and goods, though his body is in custody. *Martin v. Kerridge*, H. 1733, 3 P.W. 240.]

[Cattle sequestered may not be sold till the commission returned, and then a *venditioni exponas* for the cattle, and a new sequestration for the remainder of the debt. *Yarroth v. Seys*, P. 1720, *Bunb.* 62.]

[On affidavit of opposition to sequestrators, a writ of assistance shall be granted. *Granslade v. Baker*, T. 10 G. *Bunb.* 168.]

[A sequestration must be returned before it shall be discharged on motion on the death of the party. *Anon. in Sc. M.* 1718, *Bunb.* 31.]

[There is no absolute stated fee for a sequestrator, it is discretionary. *Wood v. Freeman*, P. 1743, 2 *Atkyns*, 542.]

And a sequestration may issue of an estate real or personal, tho' the decree be only for a personal duty. *R. Ca. Ch.* 92. 242.

And the sequestration shall be continued against the heir, if the defendant dies under it. *Ca. Ch.* 241, 2.

[But if there is a decree for payment of money, but not signed and inrolled, and a sequestration for non-performance, and plaintiff dies, the sequestration abates, and there must be a bill of revivor. *Wharum v. Broughton*, M. 1748, 1 *Vesey*, 180.]

Tho' the heir claims by a voluntary settlement of his father, with power of revocation, made before the suit. *R. Ca. Ch.* 242.

Otherwise, if it was without power of revocation (tho' voluntary). *Ibid.*

If the defendant be taken by the serjeant at arms, or committed, he shall not be discharged until he performs the decree in all things presently to be performed, and give security for the performance of the parts to be performed *in futuro*. *Ord. per Cla. Rules and Orders of*

of Chancery, 117. *Vide Pract. Reg. in Chan.* 175.—So, in the Exchequer. *Vide Rules and Orders in Exchequer*, 14. Rule 37.

And the chancellor also may fine him for the contempt, and estreat the fine. *Vide Pract. Reg. in Chan.* 175.

And if he procures himself to be removed into *B. R.*, and then escapes, he may be recommitted. *Ca. Ch.* 32.

If there is a general pardon after commitment, by which all contempts are pardoned, he shall not be discharged. *Dub. Hard.* 192.

If the decree is for land, and the defendant, being imprisoned, will not perform it, the court grants an injunction for the possession. *Vide ante*, (D 7.)

Vide Pract. Reg. in Chan. 177.

And upon an affidavit of service, and that it is not obeyed, a commission shall be granted to special justices, and a writ of assistance directed to the sheriff, if necessary to put the party into possession. *Vide Pract. Reg. in Chan.* 177. [*Stribley v. Hawkie*, *M.* 1744, 3 *Atkyns*, 275.]

If a decree is *quousque*, or temporary, and a bond, or assurance is also decreed for the performance of it, and the assurance is given absolutely, yet it shall be guided by the decree. *R. Ca. Ch.* 251.

So, a fine acknowledged, or a recovery suffered pursuant to a decree, shall be restrained of operation beyond the intent of the decree. *R. Ca. Ch.* 49.

[A sequestration goes only where the defendant is in the custody of the warden of the Fleet, not of a sheriff. *Marham v. Wilkinson*, 2 *Anstr.* 579.]

[Estate ordered to be sold for debts, money raised under sequestration paid into court, though contempt cleared. — *v. Bennet*, 1 *Ves. jun.* 89.]

[Sequestrators ordered to sell the goods, where the party was in contempt for non-payment of money. *Cavil v. Smith*, 3 *Bro. C. C.* 362.]

(Y 5.) Re-hearing,

[The decree must be made complete against the defendant, tho' he has made default, before you can petition for a re-hearing. *Baxter v. Wilson*, *H.* 1740, 2 *Atkyns*, 152. *Vide Review, ante* (G).]

[A re-hearing is not permitted till the decree is drawn up. *Crosby v. Shadforth*, *H.* 1723, *Bunb.* 142.]

[The court will grant a re-hearing, tho' the parties have entred into an order by consent to abide by the decree, and not to appeal. *Buck v. Fawcett*, *H.* 1733, 3 *P. W.* 242.]

[A decree by consent shall not be set aside. *Harrison v. Rumsey*, *T.* 1752, 2 *Vesey*, 488.]

Before the inrolment of a decree, the cause may be allowed to be re-heard, for good cause. *Vide Pract. Reg. in Chan.* 311.

As, if the fact, or proof, upon which the decree is founded, be mistaken. *Ca. Ch.* 54.

So, if there be any omission in the inrolment of the decree. 2 *Vent.* 359.

So, after an inrolment irregularly made, or by surprize. 1 *Ver.* 131, 132.

[If

[If plaintiff continues an infant till near pronouncing the decree, and his solicitor has been grossly negligent, so that the merits have not been heard, the court will discharge the inrolment of decree, (on paying costs of the day,) and permit him to apply for re-hearing. *Kemp v. Squire*, *H.* 1748, 1 *Ves.* 205.]

But generally, after an inrolment, a re-hearing shall not be allowed; for then the decree is upon record, which ought not to be vacated. 1 *Ves.* 131.

[No re-hearing shall be granted, unless applied for within six months after the decree. *Drake v. Hopkins*, *M.* 1731, *Bunb.* 309.]

So, by order 12 *May*, 2 *Jac.* 2., no re-hearing shall be granted, if the party does not deposit 5*l.* for costs, if he has no relief. *Rules and Orders of Chancery*, 167. (*Vide Pract. Reg. in Chan.* 312. where the deposit is increased to 10*l.*, and afterwards to 20*l.*)

And by the same order, a re-hearing does not stay proceedings upon the original decree without special order. *Rules and Orders of Chancery*, 167.

So, by order. 23 *Oct.* 1 *W. & M.*, the court shall be attended two days before the re-hearing, with a copy of the decree, and petition for re-hearing. *Rules and Orders of Chancery*, 186.

[Two days notice sufficient for a re-hearing. 1 *Ves. jun.* 45.]

[There cannot be a re-hearing after a decree by consent. *Semb. King v. Wightman*, 1 *Anstr.* 81.]

[A cause originally heard before the chancellor, must be opened on re-hearing as a case. *Anon. T.* 1740, 2 *Atkyns*, 50.]

(Y 6.) Decree enforced by an Original Bill.

A man decreed to do such an act may have an original bill to enforce the doing of it; as, if a mortgagee be decreed to account for profits received before and since his assignment, he shall have a bill to enforce the assignee to account for the time since the assignment. *Ca. Ch.* 3.

So, if a decree be for the king, it may be enforced upon an original bill. *R.* 1 *Roll.* 373. *l.* 50.

So, a decree in an inferior court of equity may be enforced upon a bill here. *R.* 1 *Roll.* 373. *l.* 30.

So, after a decree affirmed in parliament, a bill may be brought for the discovery of a deed embezzled *pendente lite*, in aid of the decree, or for explaining of it. 1 *Per.* 417.

So, if a decree be for a special purpose, or *quousque*, an original bill may be brought, to shew the matter satisfied, or the purposes performed. *R. Ca. Ch.* 251.

So, if the decree be for aiding a defective conveyance of land, there may afterwards be an original bill against the heir for the mesne profits. *R.* 2 *Ca. Ch.* 134. 72.

Tho' the plaintiff by his first bill had prayed an account of the profits. 2 *Ca. Ch.* 134. But this seems not to have been prayed. 2 *Ca. Ch.* 71, 72.

So, an original bill for the execution of a decree, against a purchaser, who claimed under parties to the decree, was allowed upon demurrer. 26 *Car.* 2. *Ca. Ch.* 231.

So,

So, a decree by commissioners of charitable uses was confirmed by original bill. *Ca. Ch.* 193. *Vide post.* (2 N 1.)

[If *A.* conveys a real estate for a charity, then makes his will and gives 3000*l.* (the exact value of that land) to the same charity, and 250*l.* to the same, and gives the estate to *A.* wife of *B.* and to *D.* as tenants in common; and on a bill brought for settlement and decree, and directions to the master to receive a scheme, and he reports a scheme for laying out the money in purchase of these lands, and the 250*l.* in other lands fit for the school, and report confirmed and decreed that all should be carried into execution, *B.* and *A.* acquiescing; *A.* survives and dies; *D.* settles his moiety on himself in tail, and dies, leaving an infant son; the court will not enforce the execution of the former orders. *Attorney-General v. Day*, *H.* 1748, 1 *Ves.* 218.]

So, if there be an original bill for the execution of a decree, a *parol* agreement after the decree cannot be pleaded in bar, but the party ought to enforce his agreement by a new bill, to which the other may give an answer. *R. 2 Ca. Ch.* 8.

So, a decree may be revived by *scire facias*, after it is signed and inrolled, to be put in execution. *Vide Pract. Reg. in Chan.* 351.

But a *scire facias* lies only for a party or privy; and therefore shall not be allowed for a purchaser or assignee; for he wants privy. 1 *Ver.* 426.

Yet, a defendant cannot plead in *English*, to a *subpœna scire facias*, if he is not privy, but shall apply to the court by motion. *Eq. R.* 234. (In the *Exchequer in Ireland*.)

[Tho' in general the court only enforces, and does not vary; yet, on circumstances it will consider the directions, and whether there was any mistake. *West v. Skipp*, *P.* 1749, 1 *Ves.* 239.]

(Y 7.) Or avoided.

[An original bill cannot be brought to affect or alter a decree, unless obtained by fraud; but if the decree is signed and inrolled, it must be by bill of review; if not, by application to bring supplemental bill in nature of a bill of review. *Wortley v. Berkhead*, *T.* 1754, 3 *Atkyns*, 809.]

So, a decree that a mortgagee account for profits received before, and since his assignment, was avoided by an original bill, shewing that the assignee had a title paramount to the mortgage. *Ca. Ch.* 3.

So, a decree absolute for the enjoyment of land, upon non-payment of money due upon an account, was avoided by an original bill, shewing the necessity of the non-payment, by matter subsequent to the decree. *Ca. Ch.* 64.

So, a decree obtained by fraud may be avoided by original bill, by a stranger, who may be admitted to falsify the suggestions upon which the decree was founded. *Ca. Ch.* 152.

So, a decree for alimony upon a separation, affirmed upon a bill of review, and by the house of lords upon an appeal, shall be annulled upon an original bill, brought by the husband, who tenders co-habitation. *Eq. Ca.* 6. *Vide Ca. Ch.* 250.

So, a decree against an infant may be avoided by original bill during

ing his infancy, and a re-hearing, or a review is not necessary; but it is proper to recite the errors of the decree in the bill. *P. W.* 737.

But a decree shall not be explained by an original bill, upon a matter precedent to the decree; as, if a man has a decree upon an agreement to convey a manor, being of 110 *l. per ann.*, to which a farm of 250 *l. per ann.* had fallen in, and then the decree is made for the conveyance of the manor, generally, it shall not be explained by original bill, that it did not extend to the farm. *R. Ca. Ch.* 45.

[If a decree has been made to sell a trust estate for payment of debts before the master to the best purchaser, and afterwards the trustees enter into articles with *A.* for it, and then scruple to convey, lest it should not be a pursuance of the decree: the court will not compel them, but the sale must be had before the master under the decree, and *A.* may purchase if he pleases. *Annesley v. Ashurst*, *T.* 1734, 3 *P. W.* 282.]

Nor, shall there be a bill to discover assets, upon a decree to pay costs out of the assets, &c. till the decree is signed and inrolled. *R. Ch. R.* 33, 4.

[A decree, tho' obtained by fraud, cannot be set aside on petition. *Mussel v. Morgan*, 3 *Bro. Ca. Ch.* 74.]

(Z) Accident.

Accident, fraud, and trust, are proper for relief in *Chancery*. *Fran.* 27. *Vide post.* (3 M 1, &c. 4 W 1, &c.)

If *A.* executes a bond as surety for *B.*, but by mistake of the writer, his name is omitted in the bond, the obligee shall be relieved against *A.* in equity. *R. Ch. R.* 99.

[If a deed granting a rent-charge, or a bond is lost, a bill may be brought for the rent or money, because an action at law must be with a *proport*, &c. *Anon.* *P.* 1740, 2 *Atkyns*, 61.]

So, tho' the party provides for accidents, *Chancery* sometimes relieves beyond the provision of a party; as, if an attorney, who takes 120 *l.* with a clerk, agrees that 60 *l.* shall be returned if he dies within a year, and he dies within three weeks; his executor shall return 100 guineas. 1 *Ver.* 460.

(2 A) Account.

(2 A 1.) When it shall be decreed.

C*hancery* will oblige any one to give an account for money by him received.

As, a guardian, or any one who receives rents and profits as guardian. *Ca. Ch.* 126. 1 *Ver.* 296. *Vide post.* (3 O 1.)

A woman, who receives rents, &c. upon pretence of a devise, which appears afterwards to have been revoked. *Ca. Ch.* 126.

An executor, or administrator, who receives the personal estate of a deceased.

Tho' the testator says, that the executor shall distribute the residue to such and such persons, without compulsion, and all of them acquiesce, except one. *R.* 2 *Ca. Ch.* 198.

A man, who enters without title, where the entry of the plaintiff was prevented by a lease *in esse*. *Ch. R.* 285.

If he enters by title, to receive such parts of the profits, and receives the whole, he shall account for the overplus. *Eq. Ca.* 32.

[On a bill to redeem, where the mortgagee has been in possession 37 years, and has received more than the value on it, and has kept the accounts intermixed with those of his own estate, the court will decree him to account, and afterwards order all books, papers, &c. relating to the account, to be produced on oath. *Dean v. North, M.* 1730, *Bunb.* 288.]

[If a man brings bill, praying that a deed may be produced at the trial of an ejectment which he has brought against defendant, and delivered up for plaintiff's benefit, and for relief generally, and an affidavit is annexed of the want of the deed, and it appears plaintiff could not come at the deed without the assistance of this court, and that he had an equitable title only, there being a term of years in trustees which this court removes, and plaintiff recovers in ejectment, this court will decree an account of rents and profits from the time plaintiff's title accrued, tho' the bill does not charge that defendant was in possession. *Dormer v. Fortescue, P.* 1744, 3 *Atkyns*, 124.]

[If a share in the *New River* is settled on *A.* for life, with remainders over, and after his death his heir having the settlement conceals it, and claims the share, and levies a fine of it, he shall account for the profits from the time the title accrued. *Lord Townshend v. Windham Asb, P.* 1745, 3 *Atkyns*, 336.]

A. receives pay for a company; he shall account to the captain for the whole, not for the personal pay of himself and servants only. *R.* 2 *Ver.* 682.

So, a factor, agent, &c. shall be accountable to his principal. 2 *Ca. Ch.* 11.

So, an account shall be demanded in *Chancery* against the executors of a guardian, with an averment of assets, tho' they are not privies. *R. upon Demurrer, Carey*, 54.

Or, by an executor, or administrator. 1 *Ch. R.* 261.

So, against an executor of an executor, who was guilty of a *devastavit*. *Semb. Ca. Ch.* 303. *Ch. R.* 39.

So, against executors of feoffees to a use, before the *stat.* 27 *H.* 8. 4 *Inst.* 87.

And against executors or administrators of a trustee. *R.* 4 *Inst.* 86, 7.

So, an account shall be demanded against a lessee, where the lessor covenants to allow his part of law-suits. *Ch. R.* 235.

So, against an administrator, after his administration repealed and granted to another. *R. Ch. R.* 40.

[A creditor of a partner deceased, may bring a bill against the surviving partner, as well as against the representative of the deceased; and this tho' the representative has already brought bill for an account against the survivor. *Newland v. Champion, T.* 1748, 1 *Vesey*, 105.]

So, against a factor, for himself and his co-factor, now dead, tho' his executor is accountable. *Eq. Abr.* 5.

Or, against the executor or administrator of an apprentice employed as a factor. *Eq. Abr.* 6.

So, there shall be an account by one joint-tenant, parcener, &c. against the others. 1 *Ch. R.* 49. *Vide post.* (3 *V* 6.)

So,

So, an account shall be demanded, by a legatee, against an executor of an executor of the testator, altho' a co-executor of the first testator be living, upon a suggestion that goods came to his hands; for every one, who has goods of a testator, is accountable to a legatee. *R. upon Demurrer, Ca. Ch. 57.*

[So, against an executor, tho' he stated in his answer, that the testator died insolvent, and that plaintiff had cited defendant before the ecclesiastical court, where he alleged there was no fund. *Per Sir Lloyd Kenyon M. R.*, reserving the consideration of costs. *Wright v. Lagouston, cited 2 Ves. jun. 58.*]

[If a trustee, to whom rents and profits are devised, has notice thereof, and does not renounce, but receives them, he shall account to the claimants under the will, tho' he pretends he received them not as trustee, but for the son and heir at law as his factor, and accounted to him. *Conyngnam v. Conyngnam, T. 1750, 1 Vesey, 522.*]

So, there shall be an account in equity for mesne profits. *1 Ch. R. 48.*

So, every trustee is accountable to the *cestuy que trust*.

[A trustee, named executor, not proving, but power reserved, and money coming to his hands, may be decreed to account, but not as executor, and shall have proper allowances before the master. *Moore v. Moore, T. 1755, 2 Vesey, 596.*]

So, if the trustee employ *A.* as his servant, *A.* shall be accountable to the *cestuy que trust*. *R. 2 Ca. Ch. 121.*

Altho' *A.* had accounted to the trustee himself in his lifetime. *Ibid.*

[Trustees are mere stake-holders, and cannot be affected with more than they actually receive, without wilful default. *1 Ves. jun. 193.*]

[Servant taking by collusion more than belongs to his office must account. So must a stranger on a bargain with a servant, which is a fraud on the master. *East India Company v. Henchman, 1 Ves. jun. 289.*]

[Factor buying goods, which he ought to furnish as factor, taking the profits, and dealing with his constituent as a merchant, instead of taking factorage duty, or a stipulated salary, must account. *Ibid.*]

[So must a manufacturer, who obtained by collusion an unfair price. *Ibid.*]

[*Quare*, Whether executors are not entitled to an account, without entering into an undertaking to pay absolutely. *Vid. 1 Ves. jun. 293.*]

[Where an attorney uses his influence over his client, to settle an unfair account between them, the court will open it at any time. *Leaves v. Morgan, 3 Anstr. 769.*]

[In such a suit, it is sufficient if the court see on the whole that the account is unfair, altho' the particular objections raised by the bill are not made out in evidence. *Ibid.*]

[A settled account between attorney and client, opened on general allegations by the client of error, admitted, tho' no specific errors were pointed out. *Matthews v. Wallwyn, 4 Ves. jun. 118.*]

[Bill to open a settled account, must state specific errors, not generally, that it is erroneous. *Johnson v. Curtis, 3 Bro. C. C. 266.*]

[Where the account is incidental to plaintiff's title, the defendant must set it forth. *Hall v. Noyes, 3 Bro. C. C. 483.*]

[A de-

[A decree for an account may be made without declaring the will well proved, where one of the witnesses is abroad. *Fitzherbert v. Fitzherbert*, 4 Bro. C. C. 231.]

[Where husband has received interest of wife's separate property, there shall be no account against his representatives. *Squire v. Dean*, 4 Bro. C. C. 326.]

[In a doubtful case, the account of rents and profits directed only from the time of the bill being filed. *Förder v. Wade*, 4 Bro. C. C. 520.]

[Any creditor may obtain an order for prosecuting a decree for an account. 2 Ves. jun. 165.]

So, if an infant, who used to receive money from B. by the order of his guardian, after full age receives money by order of the same guardian from B., and then accounts with the guardian, but does not put those sums into the account, and there are general releases between them, he shall be accountable to B. for those sums. *R. Ca. Parl.* 17.

So, A. shall account as bailiff to B., tho' B. seizes his papers, but afterwards restores them. *R. 2 Ver.* 33.

So, there shall be an account in equity, where there are mutual debts, tho' one is upon bond, and the other upon simple contract, and 18 years are passed; for a discount is natural justice. *Abr. Ca.* 8. altho' the discount is against an executor, or an assignee of a commission of bankrupt. *Abr. Ca.* 8. *Vide 2 Ver.* 428.

[If plaintiff claims as a creditor under articles, and also as a legatee under a will, and the legacy is so large as to cover the whole personal estate, the court will direct an account to be taken of testator's personal estate, at the time of making the will, and at the time of his death, in order to judge whether plaintiff shall take under both articles and will. *King v. Philips*, P. 1749, 1 Vesey, 232.]

[If a man cohabits with a woman, and receives her rents, and they make agreement that he shall leave her by his will as much as he receives of her estate, deducting what she is indebted to him, the account shall be taken immediately, tho' the payment is in future. *Rattray v. Darlay*, T. 1752, 2 Vesey, 424.]

[If money is over-paid in pursuance of an usurious contract, the court will decree it to be accounted for, notwithstanding the agreement of the oppressed party to allow such payments. *Bosanquet v. Dasbwood*, M. 8 G. 2. C. T. T. 38.]

[If defendant acknowledges any particular sum due, tho' he swears that those sums are discharged, it is ground for directing an account. *Brace v. Taylor*, H. 1741, 2 Atkyns, 253.]

[The court will direct an account after a very great length of time, if no presumption of satisfaction arises from it, and if plaintiff's right was not fully disclosed to him in due time. *E. Pomfret v. Ld. Windsor*, T. 1752, 2 Vesey, 472.]

[Especially if it is in part for the execution of a trust of real estate, tho' when executed it will become personal. *Ibid.*]

[If a person has offered by letters or messages to account, or to refer, an account shall be decreed, notwithstanding the statute of limitations. *Ibid.*]

[On a mere ejectment bill, if defendant admit the title and receipt of the rents, an account will be decreed. 2 Ves. jun. 128.]

[It was agreed between the owners of a colliery, and their agent, that he should have no emolument beyond his salary; he purchases timber of *A.* for the use of the colliery; it was afterwards discovered, that the timber was supplied by the agent and *A.* jointly; that *A.* secretly admitted the agent into partnership in that concern, but they were not partners in any other respect. The agent decreed by *M. R.* to account for his share of the profit made by such clandestine sale. Bill dismissed as against *A.*, as he disclaimed all knowledge that the agent was not authorised by his employers to join with him. *Maffey v. Davies*, 2 *Ves. jun.* 317.]

[Bill against trustees having various objects dismissed with costs; and the trustees having been always ready to account, the court refused to retain it for that purpose; but without prejudice to a bill for that only. *Myddleton v. Ld. Kenyon*, 2 *Ves. jun.* 391.]

[Tenant for life punishable for waste with power under an inclosing act, to mortgage for the expence of the inclosure, felled timber, and applied the produce to that purpose, decreed to account to the owner of the next estate of inheritance. *Lee v. Alston*, 1 *Ves. jun.* 78. 3 *Bro. Ch. Ca.* 37. *S. C.*]

[Admission that any timber has been wrongfully cut, gives a right to an account. *Ibid.* 82.]

(2 A 2.) When not.

[Where an account has been stated, unless particular errors are assigned. *Dawson v. Dawson*, *M.* 1737, 1 *Atkyns*, 1.]

A purchaser of the land of a delinquent, (against whom he had a judgment, which was allowed in the purchase,) shall not be compelled to account for the profits; for they are pardoned by the act of oblivion. *R. Ca. Ch.* 172, 3.

[The court will not decree an account of rents and profits of an estate, where possession has not been recovered, as trespass will not lie at law for them till then. *Norton v. Frecker*, *H.* 1737, 1 *Atkyns*, 524.]

[Nor, of rents received by the original debtor and owner of the estate, *pendente lite*, from the filing of the bill, even where a fraudulent conveyance has been set up and removed in favour of judgment creditors. *Higgins v. York Buildings' Company*, *M.* 1740, 2 *Atkyns*, 107.]

[Nor, against a mortgagor, left in possession, in favour of a mortgagee. *Ibid.*]

[An account of the profits of coals dug cannot be decreed unless plaintiff shews possession; if he has not had possession he must ascertain his right by ejectment, and then may have account, and if the bill is for settling boundaries also, the court will retain it till after ejectment, otherwise will dismiss it. *Sayer v. Pierce*, *P.* 1749, 1 *Ves.* 232.]

Nor, shall an executor of a creditor, who recovers against a bankrupt, and converts the goods before the bankruptcy is known, be obliged to account with the other creditors, as if his testator had made a *devastavit*; for his testator was in the nature of a purchaser. *Ca. Ch.* 303.]

[The

[The court will not order an account between two merchants, partners 24 years ago. *Bridges v. Mitchel*, T. 1726, *Bunb.* 217.]

Nor, shall an executor of a merchant account to another merchant, who is accountable for so much to him in another business; for all accounts between merchants, by custom, are evened by way of estoppel. *D. 2 Ca. Ch.* 7.

[The court will not order an account between the executor of a house steward and the executor of his master, when many years are elapsed between their deaths without demand made. *Lacon v. Briggs*, T. 1744, 3 *Atkyns*, 105.]

A counsellor shall not have an account against a solicitor for fees. *R. upon Demurrer*, 1 *Ch. Rep.* 38.

[If two parcelers (as the registers of the prerogative) do not agree in appointing a clerk, and the deputy does appoint one, who acts and takes the fees, he is the officer *de facto*, and entitled to the fees, and the court will not order him to account. *Seymour v. Bennet*, M. 1742, 2 *Atkyns*, 482.]

So, if *A.* enters and takes the profits of land for his life, his executor shall not account to him who claims the estate, where there was no trust or infancy in the case, and no entry by him who claimed the right. *R. 2 Ver.* 724.

So, *A.* shall not account for profits not received for an infant, or as a trustee, or when there is no entry upon the estate by another. *Eq. Abr.* 7.

And if a man covenants to secure 500*l.*, and afterwards pays part of the money, he shall not be obliged to give security for the money due upon the account, before the account stated. *R. Ca. Ch.* 294.

So, if a bill is brought by an infant, for an account of profits of land recovered against him by a verdict, he shall not have an account, till he has established his title at law. *R. 1 Ver.* 295.

So, *detainer of charters, or writings*, is a plea in bar of an account. *2 Ver.* 33.

So, an infant shall not be compelled to account upon a contract, or for goods for his trade, or as bailiff, altho' he is factor for another. *Abr. Ca.* 6.

If a receiver, appointed by a guardian or a trustee, has accounted to him, he shall not account at the full age of the infant to him. *R. Pr. Cha.* 535.

So, if the *Royal Exchange Assurance* or other company lend to a director or other person, who hath stock in the company, money upon interest, the company, without an agreement or bye-law which subjects the stock to such debt, cannot discount their debt, or refuse transfer of the stock till their debt is paid. *R. Abr. Ca.* 9.

So, a lord of a manor cannot refuse his copyholder to surrender to another, till his own debt is paid. *Abr. Ca.* 9.

[If a father administrator *durante minore atate* of his daughter, executrix and residuary legatee of her grandmother, agrees on her marriage to give her 800*l.*, which is called a *portion*, and in consideration of love and affection, and it is admitted that the residue of the grandmother did not exceed 500*l.*, the 800*l.* shall be deemed a satisfaction for it, and his representative shall not account for it, tho' he died worth 8000*l.*, and left only a son and this daughter. *Wood v. Briant*, H. 1742, 2 *Atkyns*, 521.]

[After the death of husband and wife, her representatives shall not account for money received during coverture, whether she had separate estate or not, unless a special case is made. *Peacock v. Monk*, H. 1750, 2 *Vesey*, 190.]

[Nor, is husband liable to account for the income of his wife's separate estate, which she permitted him to receive. 2 *Ves. jun.* 715.]

[Nor, shall trustee of part of personal estate be called on to account by a particular pecuniary legatee; he must account to the executor. *Moore v. Moore*, T. 1755, 2 *Vesey*, 596.]

[Administrator disputing by his answer the foundation of the bill, viz. a balance of accounts against the intestate's estate, need not set forth an account of the personal estate, &c. by way of schedule. *Philips v. Caney*, 4 *Ves. jun.* 107.]

[Bill dismissed without account, the value being trifling. *Lillia v. Airey*, 1 *Ves. jun.* 277.]

[Son employed under, paid by, and accounting to his father, may be a witness in a suit by the father's principal, but is not accountable to him. *Cartwright v. Hateley*, 1 *Ves. jun.* 292.]

[Mortgagee is not entitled to an account of rents and profits received by the mortgagor, tho' the security, being on an estate for lives, is become insufficient. *Colman v. Duke of St. Alban's*, 3 *Ves. jun.* 25.]

(2 A 3.) Account stated.

So, after an account stated, a man shall be obliged to give an account *de novo*, upon shewing particulars, in which the account was mistaken.

So, after an account stated, with the testator, and a bond given for the balance, upon allegation that 200*l.* paid and entred in his books (which he had not at the time of the account) was not allowed, the executor was compelled to answer, with a rule not to proceed further, without leave of the court. *R. upon a Plea of an Account stated*, *Ca. Ch.* 262.

So, after an account settled before a master between a mortgagor and mortgagee, upon allegation by a second mortgagee, that it was done by collusion between them, and shewing the particulars mistaken, the first mortgagee shall be compelled to give an account *de novo*. *Semb. Ca. Ch.* 299.

So, when no particulars are shewn, the defendant shall answer to the collusion. *Ibid.*

So, after an account stated upon a treaty of marriage, by the guardian of the wife, to the husband, and the balance paid, and a bond given by the husband, to give a release of all accounts after the marriage, the guardian, before the release executed, may be compelled to give an account *de novo* after the marriage. 2 *Ca. Ch.* 158.

So, after an account given of an orphan's estate before the aldermen of London, an account *de novo* shall be compelled to be made in Chancery. *R. upon a Plea*, 2 *Ca. Ch.* 170.

So, after an account stated between a mortgagor, and the heir of the mortgagee, upon proof that it was agreed, that the account should be reviewed, if there was any mistake, and that interest upon interest was computed, a new account *ab origine* was decreed. *Ca. Ch.* 55. 3 *Ch. Rep.* 18.

So, after an account between partners, and a note given for the balance, where it was by surprise, &c. *Ch. Rep.* 431.

Or, if it appears to the court, from the nature of the account, that interest upon interest was computed. 3 *Ch. Rep.* 18.

So, after an account stated, and a release given. *Skin.* 148.

[A dividend made between the parties is not sufficient to support a stated account. *Dawson v. Dawson, M.* 1737, 1 *Atkyns*, 1.]

[When defendant sets forth a stated account, he shall not be obliged to go on upon a general one, for a stated account may unravel what would remain confused on a general one. *Summer v. Thorpe, H.* 1736, 2 *Atkyns*, 1.]

[If a bill is brought for a general account, and defendant sets forth a stated one, plaintiff must amend and pay costs of the day only. *Ibid.*]

[If there are only mistakes and omissions in the stated account, the party objecting shall only surcharge and falsify; if fraud appears, the whole shall be opened tho' of 23 years standing, and the fraudulent person dead. *Vernon v. Vawdry, H.* 1740, 2 *Atkyns*, 119.]

[Where parties have mutual dealings, it is not necessary that the account should be signed, to make it a stated account, but only that the person to whom it is sent keeps it a length of time without making objection. *Willis v. Fernegan, H.* 1741, 2 *Atkyns*, 251.]

[The delivery of vouchers is an affirmation that it is a stated account, but it is not necessary in order to make it one. *Ibid.*]

[If a man aged 30, entitled as the son of a freeman, and also to the orphanage share of his sister who died an infant, states an account with his mother the executrix, it shall not be unravelled, but the parties shall be at liberty to surcharge and falsify. *Coomes v. Elling, H.* 1747, 3 *Atkyns*, 676.]

[If pending suit, parties come to composition, it shall not be set aside on new discovery, because there is no particular account by items. If a minute strict account is entred into, it may be otherwise on new discovery. *Sewell v. Bridge, T.* 1749, 1 *Vesey*, 297.]

[After an account stated, if leave is given to surcharge and falsify, the *onus probandi* lies on the party having that liberty; and if the account was between persons of great and equal abilities, the evidence must be strong to make any alterations. *Pit v. Cholmondeley, T.* 1754, 2 *Vesey*, 565.]

So, after an account in the spiritual court, and a decree thereupon. *R.* 2 *Ver.* 47.

So, after an account with the mortgagor, and a decree for foreclosure, *A.* who would redeem by a subsequent mortgage, &c. shall have an account *de novo*; and the former account is no bar. *R.* 2 *Ver.* 663.

But if a man would compel an account *de novo*, after an account stated, he ought to shew in what particulars it is mistaken. *Ca. Ch.* 299. 1 *Ver.* 180.

And after an account stated and rested on for a long time (as 14 years) without exception, the accountant shall not be obliged to give an account *de novo*. *Ca. Ch.* 127.

So, after 7 years. *Ch. R.* 66.

[A bill may be brought for errors in an account, much more than four years after it is settled. *Roberts v. Kuffin, M.* 1740, 2 *Atkyns*, 112.]

So, if the mortgagee employs a servant of the mortgagor to receive the profits, and after the death of the mortgagee, the mortgagor accounts with his executor, takes the accounts of the executor, and agrees by writing, that he will not charge him for so much, as his own servant received, he shall not afterwards compel the executor to account. *R. upon a Plea, Ch. R. 5.*

So, if a man buys goods, sold by the sheriff, upon an execution at the suit of *B.* against *C.* where they were offered to *B.* at the same price and refused, it shall be a good plea in bar, to an account. *Eq. Abr. 11.*

So, an account between partners shall be taken only from the last balance made. *Ch. R. 190.*

If no balance, from the commencement of the partnership. *Ibid.*

So, an account of the voyage of a ship, settled by the major part of the part owners, binds the rest. *1 Ver. 465. Vide post. (2 A 7.)*

So, an account between merchants, where no objection was made, after the trade between them ceased, until one of them died, shall be regarded, and the parties sent to law. *R. 2 Ver. 276.*

If no objection is made by a merchant for two or three posts, after an account received, it imports an allowance of the account. *Per Hutchins, 2 Ver. 276.*

[If a merchant sends an account current to another in a different country, on which a balance is made due to himself, and the other keeps it two years without objection, it shall be considered as a stated account. *Tickel v. Short, H. 1750, 2 Vesey. 239.*]

So, an account upon a decree for a tenant for life against his trustees, before the birth of a son in the remainder, binds the son. *R. 2 Ver. 527.*

So, if an account is decreed against an executor, and is settled and perfected and acquiesced in for many years, the executor shall not have an account for a debt due to himself. *2 P. W. 665.*

[If there is an account stated between a minor just come of age and his solicitor for composition of a cause, the court favouring such compositions will not overhaul it. *Brown v. Pring, H. 1749, 1 Vesey, 407.*]

[But accounts stated between them where there are items "For all law-charges"—What you please—"For bill of fees and disbursements" (when none such had been delivered); "For risk run in money laid out" (when no risk run, and money improperly laid out); all such shall be set aside, and a general account directed. *Ibid.*]

[An old account shall not be unravelled, tho' settled on an erroneous principle. *Gray v. Minnethorpe, 3 Ves. jun. 103.*]

(2 A 4) The Manner of the Account.

[If one of the parties appears to be a weak man, and easily induced to say any thing, tho' untrue and against his own interest, the court will order that the master shall examine him in person, and see that no advantage be taken of his weakness. *Piddock v. Brown, T. 1734, 3 P. W. 288.*]

[A party who is at liberty to surcharge and falsify is not confined to errors in fact, but may take advantage of errors in law. *Roberts v. Kiffin, M. 1740, 2 Atkyns, 112.*]

[In equity the account must be taken as it lies, unless there be a special case to vary the terms of it. 1 *Ves. jun.* 82.]

[Administratrix not allowed debts paid after a decree to account; but in taking the accounts has a right to stand in the place of the creditors she has paid. *Jones v. Jukes*, 2 *Ves. jun.* 518.]

[Where on a balance of accounts a note has been given, it must be paid, altho' there are subsequent accounts on which the payee may eventually be found indebted to the maker. *Prosser v. Strutton*, 1 *Anstr.* 50.]

[At the commencement of a partnership, the partners both living in the same house entertained their customers jointly: one removing, the whole expence of entertainments (which were necessary in the trade) fell on the other. There ought to have been an agreement in respect to an allowance: the court can make none. *Thornton v. Proctor*, 1 *Anstr.* 94.]

[The accounts having been annually balanced without such allowance, is conclusive. *Ibid.*]

[Where vouches have been delivered up, and cannot be found, the oath of the accountant must be admitted as to their import. *Lewis v. Morgan*, 3 *Anstr.* 777.]

(2 A 4.) *What allowance an accountant shall have; and what not.* The accountant shall be allowed, upon his oath, all sums expended under 40s. 2 *Ca. Ch.* 249.

[The accountant must swear peremptorily to sums under 40s.; his belief is not sufficient. *Robinson v. Cumming*, T. 1742, 2 *Atkyns*, 429.]

If he mentions in his *affidavit*, to whom, and when paid. 1 *Ver.* 223. 470. If the whole do not exceed 100l. 1 *Ver.* 470.

But other sums, &c. he shall not be allowed, without proof. *Semb.* 2 *Ca. Ch.* 12.

[If there is no positive proof of fraud, but only circumstances of suspicion, the court will not order any sum to be allowed defendant but what he shall produce receipts for, or are proved by witnesses present at the payment, but will only give leave to surcharge and falsify. *Townsend v. Lowfield*, T. 1747, 3 *Atkyns*, 536. 1 *Vesey*, 35.]

[If notes are found forged on an issue directed, the party whether suing in his own right, or as assignee, shall not be allowed to set up other evidence. *Kemp v. Mackrell*, T. 1754, 2 *Vesey*, 579.]

So, if he loses his papers without his own default, as by seizure in a foreign realm, &c. he shall not be charged, but upon his oath, for money gained by the sale of his merchandise. *R. Ca. Ch.* 128.

So, expences are allowed upon oath that they were necessary. *Ch. R.* 119.

So, seeds, &c. sold and delivered in his trade to a gardener, under 40s. value, shall be allowed upon his oath, but not trees sold by the gardener to the seedsman. 2 *Ver.* 176.

In an account by a merchant against a factor, he shall be allowed upon the account all customs saved from a foreign king. *R. Ca. Ch.* 25. 76.

Otherwise, of the customs saved from our own king. *R. Ca. Ch.* 30.

So, in an account by an infant against his father-in law for a legacy,

gacy, he shall be allowed a sum for putting him apprentice, &c. 2 Vent. 353. Eq. Abr. 7.

But not for maintenance, so as to diminish the principal. R. 2 Vent. 353.

So, a trustee for an infant shall be allowed upon account money of which it is proved that he was robbed; and his oath shall be allowed, as to the *quantum* of which he was robbed. 2 Ca. Ch. 2.

If a parcener, &c. avoids the lease of his ancestor without the privity of his companion, he shall account for a moiety of the profits, 1 Ch. Rep. 49.

If there are three part-owners of a ship, and two of them navigate the ship against the consent of the other, and the ship is lost in the voyage, he who did not consent shall have an account of the profits, if there were any, and shall bear his part of the loss. R. 1 Ver. 297.

A trustee shall be allowed a salary for a bailiff for the trust estate; but not for himself, if he manages it. 1 Ver. 316. Eq. Abr. 7.

So, in an account against A. by the administrator of B., who had mutual dealings with A. for a long time, A. shall be allowed a debt for goods sold by him to B. R. Pr. Cha. 582.

So, for diet given to B. Eq. Abr. 8.

If a settlement be for default of issue male to daughters until 3000*l.* is paid by B. in the remainder, in an account to B., the daughters shall be allowed interest for the 3000*l.*, and the rents shall not go in diminution of the principal, till a third part is raised. Ibid.

[If a father creates a term, the trustees do not take possession, heir at law takes possession, and then purchases the term, and is to account for profits from a year after being confirmed, and there is some delay in making out the title, and lives fall in; the court will direct him to account for heriots received, and fines taken on letting the estate. Blount v. Blount, P. 1748, 3 Atkyns, 636.]

So, in an account to a partner, the defendant shall be allowed money borrowed of him by the plaintiff. Eq. Abr. 9.

But the *South Sea Company* shall not be allowed money borrowed of them, on a bill to transfer stock in the company, if the stock was not made a security for the payment. Ibid.

If A. accounts, he shall not have an allowance for the diet of the plaintiff who was his relation and came by his invitation. 1 Ver. 19.

If an executor accounts for assets, he shall not be allowed a judgment confessed *pendente lite*. 1 Ver. 457.

Nor, a payment made *sponte*, without suit, *pendente lite*. 1 Ver. 369.

[In an account of the rents and profits of a real estate, the court will order annual rents to be made, but not in an account of personal estate received by an executor. Robinson v. Cumming, T. 1742, 2 Atkyns, 409.]

[If a debtor, whose lands are extended by *elegit*, comes here for relief, the creditor shall account for the whole he has received, and not for the extended value only; and the debtor shall pay interest tho' it exceed the principal. Godfrey v. Watson, P. 1747, 3 Atkyns, 517.]

So, a mortgagee who has tacked a judgment to his mortgage, shall be allowed interest upon the debt secured by the judgment, tho' it exceeds the penalty. Ibid.]

[A mort-

[A mortgagee in possession is not obliged to lay out money, further than to keep the estate in necessary repair, but if he expends money in support of the mortgagor's title when impeached, he may add it to the principal debt, and it shall carry interest. *Godfrey v. Watson*, P. 1747, 3 *Atkyns*, 517.]

[A mortgagee shall not be allowed for his own trouble in receiving rents; but if the estate lies at such a distance that he must have employed a bailiff had it been his own, he shall be allowed what he paid the bailiff. *Ibid.*]

[Tho' an account against a mortgagee or an executor is decreed without future words, yet he shall account for what he receives after the decree. *Bulstrode v. Bradley*, M. 1747, 3 *Atkyns*, 582.]

[If a long time intervenes before filing the bill, the court will not (always) order it to be taken from the time the right accrued. *Rigden v. Vallier*, H. 1741, 3 *Atkyns*, 731.]

[A receiver appointed by this court may distrain for rent, without a particular order, unless there is a doubt who has the legal right to the rent. *Pitt v. Snowden*, H. 1752, 3 *Atkyns*, 750.]

[If two parties employ an attorney to settle a matter in dispute between them, and when it is entirely finished voluntarily agree to give him 2000*l.* a-piece, and rest on this for several years, he shall be allowed his 4000*l.* in account; especially if one of the parties after bill brought for account, ratifies this gift. *Oldham v. Hand*, P. 1751, 2 *Ves.* 259.]

[If on an assignment or purchase an agent pays money to the assignee, and the assignment is afterwards set aside, the agent shall be allowed the sums paid. *Taylor v. Rochfort*, P. 1751, 2 *Ves.* 281.]

[The depositions in a cross-cause may be read on taking an account directed in the original cause, tho' the cross-bill be dismissed. *Louhiere v. Genou*, T. 1754, 2 *Ves.* 579.]

(2 A 5.) *For what he shall not be charged.*] A man who hath lost his papers, without his own default, shall not be charged but upon his oath. *R. Ca. Ch.* 128. Where the papers, &c. were seized upon an embargo in Spain.

So, an agent, factor, &c. shall not be charged for goods disposed of according to his orders. 2 *Ca. Ch.* 12.

Altho' not delivered accordingly, when the omission was by accident, or without his default. *Ibid.*

And it is sufficient by his answer to say generally, that all by him received, was disposed of according to the order of his master. 1 *Ver.* 136. 208.

Yet, he ought to answer, for it is no plea, that he paid to his master. 1 *Ver.* 95. 136.

[If a receiver is appointed, and the owner of the estate is in possession, the parties should apply to the court to have possession delivered to the receiver, who cannot distrain the owner; and therefore, if loss happens he shall not be charged. *Griffith v. Griffith*, T. 1751, 2 *Ves.* 400.]

So, a man charged to account for mesne profits of land, shall be charged only for so much as he hath received, or might have received, without his default. *Semb.* 1 *Ver.* 44, 45.

If

If an heir is decreed to account for profits to a purchaser, he shall not be charged for that which was applied for payment of the debts of the vendor, or received by the purchaser himself. *R. Ca. Ch. 101.*

A woman charged for the profits of land devised to her, which devise was afterwards revoked, shall not be charged for legacies devised out of the land, paid before notice of the revocation. *R. Ca. Ch. 126.*

If partners account, they shall not account for debts compounded but according to the composition. *Ch. R. 191.*

So, after a long time, &c. as 20 or 14 years, an accountant shall be discharged, upon his oath, where proof of debts paid, &c. cannot be made by bonds cancelled, &c. *Eq. Abr. 11.*

So, a trustee shall not be charged, with the value, which was only imaginary; for he ought to account only as a bailiff. *1 Ver. 144.*

So, if sequestrators sell timber to the value of 700*l.*, and pay only 200*l.* to the party, he shall not account for more; for the sequestrators are the agents of the court, and not of the party. *1 Ver. 160.*

So, a defendant shall not be charged in his account by the affidavit of the plaintiff. *1 Ver. 272.*

So, a trustee shall be charged for money received by himself only, and not for money received by his co-trustee, unless he joins in a receipt for it. *1 Ver. 303.*

So, an executor who *bonâ fide* lends money upon real security, not suspicious, but afterwards it is lost, shall not account for the loss, tho' the security was not taken with the approbation of the court. *Per Harcourt, 1 P. W. 41.*

[If a receiver of an estate, under order of this court, in order to remit a considerable sum to London, takes bills of a tradesman of good credit in the country, who fails afterwards, he shall not make good the loss. *Knight v. E. Plymouth, P. 1747, 3 Atkyns, 480.*]

So, where mutual credit is given, as well as where there is a current account, the one shall account to the other, or if he be a bankrupt, to the assignees, only for the balance. *Per Cowper, 1 P. W. 326.*

[If *A.* tenant in tail, lets a lease to *B.* his son, and afterwards becomes insolvent, and is discharged by the statute, *B.* shall account from the time of *A.*'s discharge only. *Smith v. Cooke, T. 1746, 3 Atkyns, 378.*]

(2 A 6.) *For what he shall be charged.*] An accountant shall be charged for all goods or monies delivered to him, or his order, or which came to his use. *2 Ca. Ch. 12.*

Altho' delivered according to his instructions, if afterwards employed by his order, or to his use. *R. 2 Ca. Ch. 12.*

So, if the delivery was to another hand, if the benefit afterwards came to his use. *2 Ca. Ch. 12.*

So, he shall account for all received, or which he might have received without his default. *1 Ver. 44. 144. Vide post. (4 A 6.)*

If an executor or trustee makes interest, he shall account for it, altho' he was not directed to place the money out at interest. *2 Ver. 548.*

So,

So, a factor shall account for himself and his co-factor, now dead, tho' his executor may be compelled to account. 1 *Eq. Abr.* 5. [1 *Ch. Ca.* 127. *S. C.* See 2 *Atk.* 510. 2 *Vesf.* 100. 265. 371.]

If *B.* enters, and takes the profits of an estate of an infant, and continues to receive them, for several years after the infant is of full age, he shall account for all the profits received after, as well as before his full age. *Eq. Abr.* 7.

So, if *A.* and *B.* purchase in moieties, and incumbrances are to be paid out of the purchase money, and the creditors abate interest out of friendship to *A.*, and for his sole benefit, he shall account to *B.* for his share of abatement. *Eq. Abr.* 7.

If the mate of a ship, upon the death of the captain in the voyage, takes the money of the captain, intended for traffic, and improves it by trade; it is not sufficient to repay it with interest, but he shall account for his improvement. *Per Harcourt*, 1 *P. W.*

140.

So, a man who continues in possession of the estate of an infant, shall account to the infant for the profits, from the time when his title accrued, and not from the filing of the bill only. 2 *P. W.* (645.)

(2 A 7.) *When bound by an account with another.*] If land is in mortgage to *A.*, and afterwards to *B.*, and a bill is brought by *A.* for redemption, *B.* shall be bound by the account between the mortgagor and *A.* upon such bill. 2 *Ca. Ch.* 32. *R.* If collusion be denied. *Ca. Ch.* 299.

[On bill brought by husband and wife, an account taken shall be binding on a contingent remainder-man when his title vests. *Allen v. Papworth*, *M.* 1748, 1 *Vesf.* 163.]

So, if land is mortgaged to *A.*, and afterwards settled for a jointure, and then the mortgagor becomes bankrupt; the account between the mortgagee and the assignee binds the jointress; for the assignees stand in the place of the mortgagor. *R.* 1 *Ver.* 179.

So, an account settled by the major part of the part-owners of a ship, binds the other owners. 1 *Ver.* 465. *Vide ante*, (2 A 3.)

So, if a book in which an account is entred by the defendant is produced to charge him, it shall be allowed for his discharge. *Eq. Abr.* 10.

If a defendant is charged only by his account annex to the answer, and upon proofs in the cause, nothing is disproved, but a matter which might have been proved, is verified by proof before a master, the defendant in other particulars shall be discharged by the same account. *Eq. Abr.* 10.

So, if *D.* is charged only by his oath, he shall be discharged by the same. *Ibid.*

(2 A 8.) *When not.*] But generally, an account with *A.* does not bind *B.*

So, an account by workmen with the government, did not bind the Duke of Marlborough for the building of *Blenheim*. *Eq. Ca.* 26. (2d part of 2 *Mod. Ca.*)

So, an account by *J. S.* with a trustee of a trust estate, who authorized

thorised him to manage it, does not bind the *cestuy que trust*. *Eq. Abr.* 6.

Yet, if *A.* receives money as servant to *B.*, and pays it to him, he shall not account afterwards to another person, to whom *B.* is accountable, unless there is collusion between them, if he declare this by his answer. *Ibid.*

And it is sufficient to say generally, that all received by him, was received and disposed of by the order of his master. *Ibid.*

(2 B) Administrator.

(2 B 1.) When he shall have Relief.

AN administrator shall be relieved in *Chancery* against a fraud to his administration; as, if an administration is wrongfully obtained, and afterwards repealed upon citation, an assignment of a term in trust for himself, shall be revoked and avoided by the subsequent administrator. *R. 2 Ca. Ch.* 129. *Vide Administrator and Administration.—Vide post.* (3 G 1.)

[If *A.* and *B.* are administrators, and empower *C.* and *D.* sons of *B.* to get in the intestate's effects, and *B.* without the privity of *A.* settles an account with them, receives the balance, gives a release and dies, tho' this release being given to persons acting under the letter of attorney of both, and therefore accountable to them in their own right, would be good in law, yet equity will set it aside if it appear unfairly obtained. *Hudson v. Hudson, M.* 1737, 1 *Atkyns*, 460.]

So, an administrator may exhibit a bill for the discovery of the personal estate of his intestate.

Altho' there is a suit in the spiritual court for revoking the administration; for that is no plea for the avoiding of a discovery. *R. 1 Ver.* 106.

[So, the next of kin and legatee in a testamentary paper, before probate or administration obtained, is entitled to an account of the personal estate of the testator, against the executor of a former will, suggested to have been obtained by fraud, the will having been impeached in the ecclesiastical court, and the probate called in, and a release from the legatee having been fraudulently obtained by his own attorney, colluding with the defendants. *2 Brown. Ch. Rep.* 121.]

[If administration is not taken out when the bill is filed, and this is not objected to in the answer, it is sufficient if it is procured before hearing. *Fell v. Lutwidge, H.* 1740, 2 *Atkyns*, 120.]

(2 B 2.) When there shall be Relief against him.

So, upon a bill by a legatee, the husband administrator *de bonis non*, &c. to his wife, executrix and residuary legatee *cum testamento annexo*, shall be obliged to give security for the legacy, upon a suggestion of his insolvency. *R. 2 Ver.* 249.

[If a person in debt has assigned his effects to one abroad, dies intestate, and the next of kin applies for administration, and is going to his usual residence out of the jurisdiction of this court, it will order

order him to give security to abide the decree to be made on hearing. *Baker v. Dumaresque*, M. 1740, 2 *Atkyns*, 66.]

But if an executor or administrator pays a debt upon bond to a trustee for himself, who had obtained judgment; a creditor shall not be aided against him. 2 *Ch. R.* 103.

Altho' the bond was given to leave his wife 1500*l.* at his death, when her portion was but 500*l.* R. 2 *Ch. R.* 103.

Altho' the whole portion was not paid; but the part not paid shall go in satisfaction *pro tanto*. 2 *Ch. R.* 104.

So, if an administration is repealed and granted to another, and the prior administrator has accounted in the spiritual court to the second, and delivered to him all the effects; he shall not afterwards be charged by creditors of the intestate, because he had goods of the testator in his hands, without an account *de novo*. R. *Ch. R.* 123.

So, if there is a settlement for a jointure in bar of all share of the husband's personal estate, which the wife may have by custom or otherwise, she shall be barred of the share, which she would have had by the statute of distribution, 22 & 23 *Car. 2.* if she survives her husband. R. *per Lord Nottingham, reversed by Lord Guilford, and affirmed by Jefferys*, 1 *Ver.* 15. *Vide post.* (2 M 10.)

[An administrator shall not be charged with interest, on account of personal estate in every case; but if he has it long in his hands, and part is out at interest, he shall. *Wilkins v. Hunt*, H. 1740, 2 *Atkyns*, 151.]

[If *A.* and *B.* are sureties with *C.* in an administration-bond, and *C.* exhibits an inventory, and *D.* a creditor of intestate by bond brings action against *C.*, who pleads no assets *ultra*, &c. and thereupon *D.* gets assignment of administration bond, and brings three actions against *A.*, *B.*, and *C.*; for that *C.* had not exhibited a perfect inventory, and no defence being made has judgment by default; this court will on a bill for an injunction order an account only of what was exhibited upon the inventory, and that the verdict shall stand as a security for so much as that shall fall short of satisfying defendant's principal and interest. *Greenfield v. Benson*, T. 1745, 3 *Atkyns*, 248.]

[A solicitor in disburse for his client, shall be paid out of a duty decreed to his administrator, and has a lien upon it before the bond creditors of the intestate. *Turwin v. Gibson*, T. 1749, 3 *Atkyns*, 720.]

(2 C) Agreement.

(2 C 1.) When decreed.

(2 C 1.) Upon articles for *Chancery* will enforce the performance of the assurance of lands.] an agreement; as, if articles are signed for the conveyance of lands for money, and the vendor afterwards refuses, he shall be compelled to make such assurance as a master shall approve. R. *Ch. R.* 20.

[In construing agreements there is no difference between a court of law and a court of equity. A court of equity cannot make an agreement for the parties; it can only explain what their true meaning was, and that is also the duty of a court of law. *Per Lord Mansfield*,

Mansfield, Douglas, 277. in the Case of Hotham v. East India Company.

[See also *Fearne's Contingent Remainders*, 59. 93. 110. 113. 125. 131. 428.]

[If a real estate is devised to trustees to sell and pay debts, &c. and the residue to the heir at law, and *A.* agrees with one of the trustees to purchase, and enters on part of the premises, the court will compel him to complete his purchase, tho' the will is not proved in equity against the heir who is abroad. *Colton v. Wilson, T. 1733, 3 P. W. 190.*]

So, if the articles are to make a jointure, lease, &c. *Vide post. (3 Z 1.)*

So, if articles are to levy a fine; a fine shall be decreed *in specie. R. 2 Mod. 91.*

So, if articles are signed, tho' not sealed, nor the money paid.

So, if a settlement upon the sister of *B.* by their father, is acknowledged by the mother and guardian of *B.*, and possession delivered, with a covenant by the mother upon her marriage, that she shall have the lands to her and her heirs, to which *B.*, during his nonage was a witness: it shall be decreed, tho' there be no proof of a settlement by the father. *Ca. Ch. 47.*

[If *A.*, tenant for life, remainder to his first, &c. sons in tail, remainder to his right heirs, and his two sons, *B.* and *C.*, release to trustees, to hold (as to part) to the use of *A.* for life, to *B.* for life, to *D.* and *E.* trustees to preserve, &c. to his first and other sons in tail, to *C.* for life, to his daughters of *B.* in tail, to the daughters of *C.* in tail, remainder to the right heirs of *A.*, and as to other part to *A.* for life, to *C.* for life, &c. in like manner, with covenant to suffer recovery in twelve months, and for further assurance, (but the trustee in the original settlement not a party,) and by other lease and release to which the trustee in the old settlement is a party, *A.*, *B.*, and *C.* make *D.* and *E.* tenants to the *præcipe* to suffer a recovery for the purpose in the former settlement; and before the recovery *B.* dies, leaving a son, and then *A.* and *C.* covenant to suffer a recovery, *D.* and *E.* to be tenants to the *præcipe*, to the use (as to part) of *A.* in fee, and as to other part to the use of *A.* for life, remainder to *C.* in fee, and the recovery is suffered accordingly; and it is found that *B.* was a bastard, yet his son shall have the lands limited to him by the first deeds, and the benefit of the covenants therein; and *C.* shall have those limited to *A.* for life, with remainder to *C.* for life. *Stapilton v. Stapilton, T. 1739, 1 Atkyns, 2.*]

[For this agreement in the lifetime of *B.* was a compromise of a doubtful right; and a compromise of a doubtful right is a sufficient foundation for an agreement. *1 Atk. 10.*]

[If father and son on the son's marriage execute articles, and settle part of the estate to the son for life, then in aid of other lands to secure wife's jointure, then to raise additional portions to daughters, then to trustees to preserve, &c. to sons in tail male, then to sons by other marriage, then to his second daughter *A.* and her heirs male, unless the father makes other appointment, then to his other daughters in tail, then to *B.*, and then to the father's right heirs; and the father and then the son die; the articles shall be carried into execution for the benefit of *A.* *Goring v. Nash, M. 1744, 3 Atkyns, 186.*]

[If *A.* on marriage with *B.* agrees to settle her fortune on her for life, then if no children to himself; and afterwards, an accession of fortune comes to *B.* on her sister's death, to arise by sale of her father's estate, which is sold, and the money received by *C.*, a trustee in the marriage articles, to whom *A.* gives a receipt for his share, which he thereby promises to lay out pursuant to the trust reposed in *C.*, this note binds *A.* his representatives and claimants under his will to perform, and the court will decree the money to be so laid out. *Whorwood v. University College, T. 1750, 1 Ves. 534.*]

So, if upon a purchase, there is a covenant to give collateral security that his wife shall not revoke it, it shall be decreed, that the heir of the wife shall convey, or that such collateral security shall be given. *Ch. R. 192.*

So, if there is an agreement for the sale of an estate, the heir shall be decreed to convey, tho' the money shall be paid to the executor. *2 Ver. 215.*

So, if the agreement is by bond, to settle before such a day, and the obligor dies before the day, by which there can be no performance, and the bond is saved. *R. Eq. Abr. 18.*

If there is an agreement, before the death of *B.*, to divide all that *B.* should devise to *A.* and *C.* between them, it shall be decreed. *2 P. W. 183.*

If an agreement is by a vestry, upon a valuable consideration, that a bell shall not be rung in a morning early. *2 P. W. 267.*

If there is an agreement for the purchase of land, and the purchaser dies, the executor shall be decreed to pay the money, tho' the agreement was voluntary, and the land shall be conveyed to the heir. *2 P. W. 175. (631.)*

[If a contract for stock be executed, the court will not break into it; if it be only executory, plaintiff must seek his remedy at law. *Copper v. Harris, M. 1723, Bunb. 135.*]

[An agreement for a lease from a dean and chapter, signed by the dean only, for himself and chapter, shall bind the chapter. *Dean of Ely v. Stewart, T. 1740, 2 Atkyns, 44.*]

[If *A.*, treating with the agent of *B.*, consents he (*B.*) shall build, on condition he employs him (*A.*) in his trade, the agent says nothing, *B.* builds and does not employ *A.*, and *A.* builds a wall to obstruct the lights; *A.* shall be decreed to pull down the wall, and *B.* shall employ him. *East India Company v. Vincent, M. 1740, 2 Atkyns, 83.*]

[Specific performance of articles of agreement to grant a lease to the plaintiff decreed, altho' he had contracted to underlet contrary to the articles. *At the Rolls, Williams v. Cheney, 3 Anstr. 59.*]

[At an auction, one person only bid for the vendor to 75 *l.* an acre, on a private notice to the auctioneer: then after a contest with real bidders, the estate was bought at 101 *l.* 17 *s.* an acre, and the purchaser some days afterwards paid the duty; he was decreed to perform the contract with costs. *Bramley v. Alt, at the Rolls, 3 Ves. jun. 620.*]

[No objection to a sale by auction that persons were employed by the vendor to bid for him without public notice. *Semb. Connolly v. Parsons, 2 Ves. jun. 625. in not.*]

[Perform-

[Performance cannot be decreed of an agreement with a variation made in it by the court. *Jordan v. Sawkins*, 4 Bro. C. C. 477.]

[Specific performance of an agreement to purchase, may be decreed after considerable delay; if the vendee has not demanded his deposit, or shewn a determination not to proceed in the purchase. *Pincke v. Curtis*, at the Rolls, 4 Bro. C. C. 329.]

[Upon sale of a reversion, a part of the terms was, that the purchase money should be paid by a certain time: not being so by default of the vendee, vendor held to be discharged from his contract. *Newman v. Rogers*, 4 Bro. C. C. 391.]

(2 C 2) *Against whom it shall be decreed.*] So, an agreement shall be decreed against a subsequent purchaser, with notice. *R. Ca. Ch.* 212. *Vide post.* (4 I, &c.—4 W 28.)

Altho' a conveyance and fine be executed to him. *Semb. Ca. Ch.* 212.

[So, against the heir of a person who contracted to sell a piece of land for a sum of money and an annuity, tho' the annuitant died before any payment became due, if no impeachment can be made to the fairness of the transaction. 1 *Brown. Ch. Rep.* 157.]

[But if *A.* being indebted to *B.* by judgment, agrees to assign a lease to him who is to give him a defeasance, and *A.* sends the lease to *B.*, and a letter to a scrivener to draw such assignment and defeasance, and before execution dies; and his executor, without notice, assigns the interest of lease to *C.* and *D.* in trust for himself, and then for them (who were all judgment creditors). Tho' this is a good lien on the testator, and on the executor, and within the statute, yet as the executor and *C.* and *D.* have a legal as well as an equitable title, the court will not decree the agreement to be carried into execution. *Smith v. Watson*, in *Sc. H.* 1719, *Bunb.* 55.]

So, there shall be a decree against an heir, who claims by voluntary conveyance, where the articles are upon a valuable consideration. *R. 1 Ch. R.* 146, 7. *Vide post.* (3 M 5.)

So, if *A.* who has only a possibility, in case his elder brother dies without issue, agrees to settle lands, after his decease, if they descend to him, upon a relation, who married without his father's consent, to the intent that his father should be reconciled, tho' there was no other consideration. *R. 1 Ch. R.* 159.

So, an agreement with an infant, if he receives interest under it after his full age, shall be decreed against him. 1 *Ver.* 132.

So, an agreement with the trustees of the inheritance, after an estate for life in *A.* for the purchase of the whole estate, shall be decreed against *A.*, if made with his consent. *R. 1 Ch. R.* 228.

[If money is devised to be laid out in land, to the use of *B.* in tail, remainder to *C.* in fee, and they agree in writing to divide the money, and *B.* dies without issue before it is divided, the agreement shall be decreed against *C.* in favour of *B.*'s executor. *Carter v. Carter*, *P. 6 G. 2. C. T. T.* 271.]

So, an agreement with husband and wife to levy a fine, make a surrender, &c. shall be decreed against the wife surviving. *R. 2 Ver.* 61.

So,

So, by an elder and younger brother, it shall be decreed against the younger, after the death of the elder brother. *Dub. Winch*, 4, 5.

But an agreement, by tenant for life or in tail, lord of a manor, for a copyhold estate, shall not be decreed against him in the remainder or reversion. 1 *Ver.* 472.

[If tenant in tail, with or without remainder over, contracts for sale, receives the purchase-money, and dies without fine or recovery, the agreement shall not be carried into execution against the issue in tail, or remainder claiming *per formam doni*; even tho' tenant in tail had been decreed to perform. 2 *Vesey*, 634.]

[But the reason of this case is that the issue or remainder-man claim not from the tenant in tail, but from the original creator of the estate.]

An agreement by a joint-tenant for his moiety shall not be decreed against the survivor. 1 *Ver.* 63.

Yet, an agreement upon a marriage to make a settlement, after the issues of the marriage, upon other sons of the father, shall be decreed against the covenantor at the suit of the younger son, tho' not within the consideration. 2 *P. W.* (594.)

So, a voluntary settlement shall be decreed against the heir.

So, a voluntary settlement upon one daughter shall be decreed against the other daughter and co-heir, tho' the father by his will devised the estate to them both. *R.* 1 *Ch. R.* 167.

So, an agreement by *A.* and *B.* upon the account of a parish for pavement or other work done for the benefit of the parish, where *A.* has the agreement in his custody, shall be decreed against *A.* and *B.*, and they must pursue their remedy against the other parishioners. *R. Hard.* 205.

If *A.* and others undertake the draining of a level, and are allowed a third part of the level, and thereupon agree to maintain the banks of the whole; *B.* upon this agreement shall be aided against *A.* and the others, if they do not maintain them, altho' he is not party or privy to the agreement. *R. Hard.* 169.

(2 *C* 3.) *When upon a parol agreement, and when not.*] So, if there be an agreement by *parol*, if it is in part executed, as if the money, or the greatest part of it, is paid to the vendor. *Vide Eq. Abr.* 19.

[An agreement is binding on a party who has not signed it, if he has done a particular thing thereon, as if he has paid part of purchase-money. *Owen v. Davies*, *H.* 1747, 1 *Vesey*, 82.]

So, if a man exchanges land by *parol*, and one party enters upon the land, he shall be compelled to convey his land to the other. *Vide Eq. Abr.* 21.

So, a *parol* agreement, executed by delivery of the possession, was decreed against a purchaser with notice after conveyances to him executed. 1 *Ver.* 364. *Eq. Abr.* 21.

So, a *parol* agreement in consideration of a marriage with the party's niece, where the husband has made a settlement accordingly on his part. *R. Ch. R.* 465.

So, upon an agreement for the surrender of a term, where the lessor accepts the key, he shall be bound to accept of the surrender. *R.* 2 *Ver.* 113.

So, if *A.* offers 1200*l.* for a purchase, which is accepted, and *A.* has possession given, and a conveyance is directed, but afterwards *A.* would recede, he shall be decreed to proceed, if the title is good. *R. 2 Ver. 455.*

[If *A.* has paid part of the purchase-money for copyhold lands, and *B.* given him a note acknowledging the receipt in part, and promising to make good title, &c. and brought his writings to *A.*'s counsel who approved, and *A.* had done acts of ownership and made promises, &c.; the court will compel *A.* to a specific performance. *Borret v. Gomeferra, in Sc. M. 1721, Bunb. 94.*]

So, if an agreement is executed for the making of a jointure, &c. and afterwards, by *parol* agreement, part of the portion is deposited, for making a purchase of the jointure, and 100*l. per annum* is purchased therewith, and afterwards mortgaged, there shall be a decree against the mortgagee. *R. 2 Ver. 619.*

[If there is an agreement in writing for taking a house at 32*l.*, owner to put it in repair, and afterwards *parol* agreement for 40*l.*, owner having rebuilt with tenant's consent, and lessee brings bill for specific performance of the written agreement, *parol* evidence may be given of the new agreement to rebut the equity prayed. *Legal v. Miller, T. 1751, 2 Vesey, 299.*]

[If a man gives bond to his son's marriage to pay his wife and the survivor 150*l. per annum*, *parol* evidence may be given that the real agreement of all parties was for 100*l.* only. *Pi cairne v. Ogbourne, T. 1751, 2 Vesey, 375.*]

But a *parol* agreement was not decreed when the money was not paid, tho' it was provided for the vendor; but only damages given for the money provided.

So, where the draught of a conveyance was agreed to and ordered to be ingrossed, the agreement not being signed, nor any money paid, it was not decreed.

[The vendees ordering conveyances to be drawn, in pursuance of a *parol* agreement, and going several times to see the premises, and a letter from the vendor mentioning the agreement but not the price, are not sufficient evidence to have the agreement decreed; but taking possession, or such other act, in pursuance of agreement, is. *Clerk v. Wright, H. 1737, 1 Atkyns, 12.*]

[If a steward makes an agreement with a tenant to deliver up part of his premises, and to have a new lease of the rest on certain terms, and the tenant delivers the agreement to the steward to be entred in his lord's contract book, which is done, and the tenant delivers up the part of his premises accordingly; yet the lord is not bound by this agreement. *Charlwood v. D. Bedford, H. 1738, 1 Atkyns, 497.*]

[If *A.* and *B.* agree, that if *B.* will surrender his copyhold to *C.*, *A.* will secure him an annuity of 5*l.*, and *A.* surrenders his copyhold to *C.* charged with the annuity, but *B.* refuses to surrender his, *C.* shall not be obliged to pay the annuity, and *parol* evidence may be admitted to rebut the equity set up by the bill. *Walker v. Walker, M. 1740, 2 Atkyns, 98.*]

[But *C.* might bring his bill to compel *B.* to surrender. *Ibid.*]

[If husband gives bond to trustees to secure 500*l.* to his wife; if she survives, *parol* evidence cannot be admitted to shew it was intended in lieu of dower. *Tinney v. Tinney, M. 1743, 3 Atkyns, 8.*]

[If

[If a bill is brought to carry into execution agreement for the lease of a house, defendant the lessor shall be admitted to parol proof that plaintiff, who wrote the agreement, omitted to make the rent (which was reduced to 9*l.* instead of 14*l.* the former rent) payable clear of all taxes. *Joynes v. Statham*, M. 1746, 3 *Atkyns*, 388.]

[If *A.* tenant in tail, to raise money to pay debts on his estate, proposes to his brother *B.* tenant in tail in remainder, to join in mortgage and bond for 1000*l.*, which is done, and the money all paid to *A.* on a bill brought against *B.* to exonerate the personal estate of *A.*, parol evidence shall not be admitted to prove that this debt shall be entirely on the estate of *B.* *Semb. Robinson v. Gee*, 1749, 1 *Vesey*, 251. (a).]

[Agreement for a lease of a farm referring to a paper containing the terms of it, parol evidence, to prove which of the clauses in that paper had been read at a meeting between the parties, refused. *Brodie v. St. Paul*, 1 *Ves. jun.* 326.]

[If a mother agrees to give her daughter a portion on marriage, which is recited in articles to which she is not a party, but sets her name as witness, she shall be decreed to pay. *Welford v. Beezeley*, M. 19 G. 2. *Wilson*, 118.]

So, after 18 passed, and a fine levied of the land, and no claim within five years, a parol agreement was not decreed.

So, where only 10*s.* was paid, or 20*s.* 1 *Ch. R.* 241.

So, a lease by parol only shall not be decreed against the heir. *R.* 2 *Ca. Ch.* 202.

[Where there is an agreement by parol, and part of it executed, equity will decree specific execution of the whole; but where there is an agreement by writing executed, evidence cannot supply any defect in that agreement, which was intended to be part of that agreement, but not inserted in it. *Binstead v. Colman*, in *Sc. T.* 1720, *Bunb.* 65. But if the non-insertion is charged to have been by fraud. *Qu.*]

[Bill for specific performance of a parol agreement to renew a lease of the estate of the two defendants, on which the plaintiff had built a house. A single witness for the plaintiff proved an agreement different from that in the bill: the defendants by their answers state an agreement different from both: in strictness the bill ought to have been dismissed; but specific performance was decreed according to the answers, with costs against the plaintiff. *Mortimer v. Orchard*, 2 *Ves. jun.* 243.]

(2 C 4.) *Since the st. 29 Car. 2. c. 3.* And by the *st. 29 Car. 2. 3.* all leases, estates, or interests of freehold or for years, or any uncertain interest in or out of lands, tenements, &c. not put in writing, and signed by the parties or their agents, authorized in writing, shall have no effect but as estates at will, except leases not exceeding three years, whereof the rent shall be two thirds of the true value. *Vide post.* (3 Z 2.)

[(a) The result of all the cases relative to the admission of parol evidence to prove agreements seems to be this; that where a bill is brought to enforce a parol agreement, if nothing be done to take it out of the statute of fraud, it shall not be decreed; but where a bill is brought for another purpose, evidence may be given on the part of the defendant, of a parol agreement, to rebut the equity of the plaintiff's bill.]

And no action shall be to charge a defendant, on any agreement on consideration of marriage, or on any contract or sale of lands, &c. or any interest concerning them, unless such agreement, or some notice of it, be in writing signed by the party or some authorized by him.

[Equity will not lay down any other rule of construction of this statute than law does. *Hayward v. Hammond*, M. 1738, 1 Atkyns, 13.]

[To add to an agreement in writing, by admitting parol evidence of what will affect land, is against the statute, and against the rule of common law prior to it. *Parteriche v. Powlet* T. 1742, 2 Atkyns, 383.]

And therefore an agreement by *parol* shall not be decreed, tho' the plaintiff expends money in confidence of it. 1 Ver. 151.

[So, if A. agrees to sell land to B. and writes to his agent to give him the title deeds, he having agreed to dispose of it to him, and then A. sells it to C. who had notice of this transaction; yet this letter does not take it out of the statute of frauds and perjuries, for the agreement does not appear in it. *Seagood v. Neale*, P. 7 G. Str. 426.]

So, when an agreement is in writing, and an additional agreement is afterwards made by *parol*, this shall not be helped. R. 2 Ca. Ch. 142.

If A. in treaty for a purchase desists, upon an agreement by B. to permit him to have part of the land, tho' B. thereupon purchases. *Cont. at the Rolls, but per Cowper acc.* 2 Ver. 627.

So, if there is a letter agreeing to give so much with a daughter, and afterwards a different agreement is written, but not signed, it shall not be decreed. *Semb.* 2 Ver. 34.

Yet an agreement to assign a term and goods, and that it should be put in writing, was decreed to be executed, it being part of the agreement that it should be put in writing and part of the money being paid. R. upon a Plea of the stat. 29 Car. 2. 2 Ca. Ch. 135, 6. Adm. 1 Ver. 151. Especially if the reducing it into writing is prevented by fraud. *Eq. Abr.* 19. (a)

If a bond is given by a woman to A. to settle her estate on him in fee after marriage; altho' the bond is made void by the marriage, it shall be evidence of the agreement, which shall be decreed. 2 P. W. 244.

So, an agreement to sell a house, &c. signed only by one; he shall be enforced to perform it, tho' it was not signed by the other. R. 2 Ca. Ch. 164.

So, if an agreement be by A., B., and C. to make a lease, and it is executed by A., it shall be decreed that B. and C., who were the sons of A., shall execute it, tho' the agreement was by *parol*; for it is out of the statute. R. upon a Plea of the stat. 1 Ver. 210.

An agreement for a mortgage shall be decreed, tho' by *parol*, where it was executed by one party. *Eq. Abr.* 20.

(a) Note: Lord Thurlow said that where the medium of fraud was interposed to prevent the agreement being put in writing, and it was stated to be part of the agreement that it should be put in writing, he agreed that this would take it out of the statute; but that the doctrine as laid down here generally was but a single decision, and contradicted, though not expressly, yet by the current of opinions. 2 Brown, 565.

So,

So, if *A.* upon a treaty of marriage between his daughter and *B.* writes by letter, that he will give 1500 *l.* in answer to a letter by *C.*, and afterwards *C.* by another letter says, that he will go no further in the treaty, if *A.* will not give more, and *A.* afterwards by *parol* declares that he will give 1500 *l.*, he shall be decreed so to do, tho' the first promise to *C.* seemed to be waived by his answer.—*R. 1 Ver. 111. 201. R.* where there was such a letter without more; and affirmed in parliament, *2 Ver. 322. Dub. Eq. Abr. 20.*

But a letter, that he will give 3000 *l.* not shewn to the husband, who accepts of 2000 *l.* given by will, is not a ground for more. *2 P. W. 75.*

So, if a joint-lessee agrees by *parol* to assign his part of the lease to his companion, and accepts of any thing to bind the contract, the statute is no plea. *1 Ver. 472, 3.*

[So, if there is a *parol* agreement for a lease for 21 years, and lessee enters and enjoys for several years, he shall not plead the statute. *Earl of Ayleford's Case, M. 1 G. 2. Str. 783.*]

So, if money is expended, in confidence of a *parol* agreement, equity will relieve for the money. *1 Ver. 159.*

So, if a lease by *A.* to *B.* is agreed by *parol*, and drawn and ingrossed by the counsel of *B.* and afterwards executed by *A.*, it shall not be avoided by *B.* *Semb. upon a Plea of the stat. and the Plea overruled. 1 Ver. 221, 2.*

[A person subscribing a deed as a witness only, and knowing the contents, is a signing within the statute, if it is a complete agreement reduced to a certainty; for where the substance has been complied with, the forms of the statute have not been insisted on. *Welford v. Beasley, P. 1747, 3 Atkyns, 503. 1 Vesey, 6.*] *Wilson, 118.*

So, if an agreement, upon a treaty of marriage, is drawn by an attorney, but before the signing they part, yet the marriage is solemnized with the privity of them all, it shall be decreed. *R. 2 Ver. 200.*

[So, if the defendant before marriage promised verbally to settle the plaintiff's estate to her separate use, and after marriage declares by letter, that he is ready to sign the writings according to her desire; he shall not be permitted to plead the statute of frauds and perjuries. *Viscount Dowager Montacute v. Maxwell, M. 6 G. in Canc. Str. 236.*]

[If an agreement is made previous to marriage, that an estate shall be after the mother's decease enjoyed by the wife for her separate use during the coverture, and the deeds are drawn, limiting it to the husband, and she refuses to execute till rectified, whereupon a note is given and signed by the husband that she shall so enjoy; this note shall be looked on as part of the agreement and settlement, and the wife shall be relieved against the husband or his assignees. *Tyrell v. Hope, P. 1743, 2 Atkyns, 558.*]

[If there is an agreement that 500 *l.* shall be settled to the wife's use during coverture, and afterwards as she shall appoint, but the parties are married before it is executed; afterwards it is prepared, and alterations made in husband's writing, who tells wife that they are for her benefit, and suffers her to receive to her use during coverture; the statute of frauds cannot be pleaded to a discovery of such agreement. *Taylor v. Beech, T. 1749, 1 Vesey, 297.*]

If signed by the plaintiff, but the defendant tears the articles, yet assents to the marriage, the defendant shall be decreed to execute. *R. 2 Ver. 373. Eq. Abr. 20.*

If an agreement prayed to be performed be confessed by the answer, it shall be decreed, altho' by parol. *Eq. Abr. 19. Eq. Ca. 86. (2d part of 2 Mod. Ca.) (a).*

[Bill for specific performance of an agreement for the sale of lands and chattels: Plea, stat. of frauds. The defendant, during the negotiation, delivered a particular of the whole signed by him. The agreement was afterwards made at a less price. Both parties gave instructions to the attorney to prepare the conveyance; and defendant delivered to him the particular, as instructions for the deed, which was prepared. Plea good; and the agreement, being void as to the lands, is void *in toto*.]

[The bill charging that defendant had written to the attorney, in which the agreement was admitted, there must be an answer to that fact. *Cooke v. Tombs, 2 Anstr. Rep. 420. Ibid. 425. in notis.*]

[By the terms of an auction, the title deeds were to be produced by a certain day, but were not produced on the day; the purchaser received them afterwards without objection; held, he could not then, on disliking the title, object to the delay. *Smith v. Burnam, 2 Anstr. 527.*]

[*A.* agreed to sell goods to *B.*, to be accounted for in part of a debt due to *B.*; *C.*, with notice, agreed to sell the goods as factor, not allowed to retain for a debt due to him from *A.* *Weymouth v. Boyer, 1 Ves. jun. 416.*]

[Property in a cargo transferred by a bill of sale signed by vendor and vendee; but by a new agreement signed by them before they parted, that it should be sold and accounted for by the factor for vendor, the case is reduced to that of an agreement, and therefore a subject for equity. *Ibid. 425.*]

[See collection of cases, *3 Ves. jun. 38. in notis.*]

[The court has gone too far in taking cases out of the stat. of frauds on the ground of part-performance of an agreement; the relief ought to have been confined to compensation. *Per M. R. 3 Ves. jun. 712.*]

[Bill for specific performance of a parol agreement to grant a lease for 20 years: plea the stat. of frauds, and answer, denying that facts alleged as a part-performance were done in part-performance; the plea was saved to the hearing, with liberty to except; the Lord Chancellor inclining to the opinion, that altho' the agreement were admitted, the stat. might be used as a defence to the suit. *Moore v. Edwards, 4 Ves. jun. 23.*]

[Bill for specific performance of a parol agreement for a lease within the statute of frauds, charging possession taken under the agreement, and other acts of part-performance; plea of the statute, and answer, not denying the acts alleged as a part-performance; but stating, that being advised, he entered as tenant at will, he gave notice to quit; plea over-ruled. *Bowers v. Cator, 4 Ves. jun. 91.*]

(a) Note; There seems yet to be much doubt on the subject of pleading the statute to parol agreements, and how far a confession, by answer, will over-rule the plea. *Vide* this question much agitated in *2 Brown. Ch. Rep. 559, et seq.*

[2 C 5.] *Decree, tho' not equal.*] And an agreement may be decreed, tho it is not equal; as, if a man agreed to assign a college lease, for an abatement of 420 *l.* (when the lease was purchased for 4320 *l.*) when the king was restored; the agreement was decreed against the son after the Restoration. *R. Ca. Ch. 42.*

If *A.* agree to pay 750 *l. per ann.* for rent of water to the city of London, and it is not of the value of 300 *l. per ann.* he shall not be aided; for a losing bargain shall be decreed as well as a beneficial one. *R. 2 Ver. 423.*

If *A.* agrees to pay 40 *l. per ann.* to *B.* an executor, in consideration of the personal estate of the testator transferred to him, and there is not sufficient for payment of debts, if there was no misrepresentation, it shall be decreed to be carried into execution. *R. 1 P.W. 542.*

[Where a nephew entitled to an estate on the death of an uncle without issue agreed to give the defendant 6000 *l.*, on the death of the uncle before the nephew, without issue, in consideration of 200 *l.* annually during the joint lives of uncle and nephew, provided that if the uncle did not die without issue, nor the nephew survive the uncle, the defendant should lose the money; the annuity was regularly paid, and the nephew survived the uncle, who died without issue; a bill brought by the nephew to set this agreement aside was dismissed. *2 Brown. 17.*]

[2 C 6.] *Tho' founded upon mistake.*] So, an agreement founded upon mistake, may be decreed; as, if tenant in tail devises freehold land to his youngest son, and copyhold to the eldest, and the youngest sets up a recovery, whereupon it is agreed, that the youngest and eldest son shall enjoy their respective devises; the agreement was decreed against the eldest son, tho' no recovery was completed. *R. Ca. Ch. 85.*

So, marriage articles to make a settlement upon a son, for life, to his wife for jointure, then to the first, second, and other sons of the marriage, then to the right heirs of the son, shall be allowed, tho' the father insists that he was surprised, and intended, upon default of issue male, to have a limited provision for the issue female of the marriage, and then to his second son, &c. *1 Ver. 320.*

[If the proper papers are before the parties and their counsel, when preparing an agreement, they shall be supposed to be acquainted with the consequences at law; and after an agreement has settled all disputes between parties, the court will not enter into a question which might have been started had there been no such agreement. *Pullen v. Ready, M. 1743, 2 Atkyns, 587.*]

[If a man devise an annuity payable out of real estate, and the annuity is paid for many (16) years, without any deduction, the court will presume it was by mutual consent, and will not decree the annuitant to refund the land-tax, tho' for the future he shall be subject to it. *Nicholls v. Leeson, M. 1747, 3 Atkyns, 573.*]

[The court will not relieve against a contract in writing, (as a policy of insurance,) unless there is express proof of the mistake of the intention of the parties. *Henkle v. Royal Exchange Assurance, M. 1749, 3 Vesey, 317.*]

(2 C 7.) *Tho' the consideration was remote.*] So, an agreement shall be decreed, tho' it be for the settlement of a remainder after an estate-tail. *Cont. Ca. Ch. 244. Vide post. (2 T 9.—4 H 9.—4 O 7.)*

So, if a woman agrees with the heir, who claims the inheritance, that if she dies without issue, she will leave him the land, or 500*l.*, and afterwards marries and dies, the agreement shall be decreed against the husband. 1 *Ver. 48.*

So, if an agreement for a jointure, provision for children, &c. is voluntary, it shall be decreed. 1 *Ver. 427, 8.*

But, where *A.* settles land, upon the marriage of *B.*, his son, for life, afterwards to his wife for life, afterwards to the heirs of the body of *B.*, and covenants to make a settlement of other land to the same uses, and makes *B.* his executor, and dies, without making any other settlement: *B.* levies a fine of the lands settled, and gives 200*l.* to *C.*, his son, upon condition that he releases all demands to his executrix; *C.* shall not be aided, in respect of the covenant of the other settlement made by *A.*, because by such settlement *B.* would have been tenant in tail, and might, by fine or recovery, have barred *C.* 1 *Ver. 480.*

(2 C 8.) But an Agreement shall not be decreed.

(2 C 8.) *If made without a consideration.*] But an agreement shall not be decreed, if there be not any consideration for it. *Vide post. (2 T 9.)*

Or, if the consideration does not extend to the plaintiff; as, if *A.* upon the marriage of his son with *B.*, covenants to settle lands, to the use of himself for life, then to the son for life, then to *B.* for life, then to the first and other sons of the marriage in tail, remainder to *D.*, his cousin, &c. After the death of the son without issue, *D.* shall not compel the execution of the covenant against the devisee of *A.* *R. in Exch. 5 G. 2. inter Parry and Hughs, 2 P. W. 256.*

[An agreement to settle boundaries mutually is a consideration for the court to decree specifically. *Penn v. Ld. Baltimore, P. 1759, 1 Vesey, 444.*]

If *A.* has a personal estate by will, which gives it, if *A.* dies without heirs male of his body to *D.*, and afterwards *A.*, upon marriage, agrees to purchase land to be settled *ut supra*, and before the settlement is made, *A.* dies without issue male, having three daughters. *Qu.* Whether *D.* shall compel execution? *Temp. G. 2. 10. Vide infra.*

[If tenant for life contract for sale of lands, the agreement shall not be decreed for the son, because the lien was not reciprocal. *Armiger v. Clarke, T. 1722, Bunb. 111.*]

But, if the consideration extends to him in the remainder, it shall be decreed; as, if *A.* and his son, upon the marriage of the son, covenant to make a settlement, after the issue of the marriage, upon *B.* the second son, it shall be decreed, if there was an estate in the eldest son; for perhaps the settlement on *B.* was an inducement to *A.* to join. 2 *P. W. 256. (594.)*

So, if a testator had limited a personal estate to the son of *A.*, and after his death without heirs male of his body, to *B.* the second son. 2 *P. W. (600.)*

[An agreement to pay money in consideration of stifling a prosecution

tion for felony shall not be decreed; but for stifling a prosecution for fraud, it may. *Johnson v. Ogilby*, P. 1734, 3 P.W. 277.]

[2 C 9.] *If it be unreasonable.* Or, if it is apparently unreasonable; as, a marriage agreement, by which the daughter would have more than the father, who was in debt, and the mother and two other daughters would have left, where the husband afterwards made his addresses to another woman, and then, without reducing the agreement into writing, married this daughter, was not decreed. 2 Ca. Ch. 17.

So, where A. agreed to sell land to B. for 15,000*l.*, which was to be paid in money, or land to such a value returned for it, and afterwards sold at an under-value, part to B., on pretence that it was immaterial what value was expressed, and then B. would have returned the residue in land; the agreement was not decreed, altho' performed in part. R. 2 Ver. 186.

So, an agreement of a woman, in consideration of 10*l.* to pay 100*l.* if she married, shall be relieved for all but 10*l.* Ow. 34.

So, an agreement for 30*l.* and 20*l.* per ann. for the life of a father, to convey the party's remainder in tail, after the death of his father, of the value of 800*l.* if he came into possession, shall not be decreed. R. per Nottingham, cont. per North, but acc. per Jefferys, 1 Ver. 167. 271.

[If a daughter left an infant, soon after coming of age, agrees with the widow concerning the distribution of her father, an intestate's estate, and her husband afterwards ratifies the agreement, yet if it appears that it was considerably more valuable, and that daughter and husband were both ignorant of it, the agreement shall be set aside. *Cocking v. Pratt*, H. 1749, 1 Vesey, 400.]

If it becomes unreasonable by matter *ex post facto*. Vide *post*. (2 T 13.)

[Deans and chapters, for fear of incurring the penalties of the restraining statutes, have been careful of preserving the same descriptions in their leases since the statutes, as before; and possibly at the time of the old leases there might be barns or ancient buildings which, after such a length of time, must have been long since decayed and gone; and therefore where the ancient descriptions are preserved, they cannot have a decree in Chancery for a specific performance of covenants for repairs against the present tenants, but must be left to their legal remedy of an action at law for non-performance. 2 Atkyns, 44, 45.]

(2 C 10.) *Or void in law.* So, if it is void by law; as, if the agreement is to give re-entry to a stranger.

[This court will not carry into execution an agreement for assignment of the fees and profits of the office of keeping a house of correction, for it is contrary to the intent of 23 H. 6. c. 10.; nor the profits of the tap-house, for it tends to increase debauchery. *Methwold v. Walbank*, H. 1750, 2 Vesey, 238.]

So, if there be an agreement by husband and wife, it shall not be decreed against the wife, after the death of her husband. 2 Ca. Ch.

27.

Yet, where an agreement cannot be performed specifically, by reason

son of an innumbrance, there shall be a settlement for a recompence out of the personal estate of the party. *Ch. R.* 406.

[An apothecary gave his patient fifty guineas to receive five hundred, or an annuity of one hundred, if the patient should survive a year, which he did: bill to enforce the agreement against his executors dismissed without costs, on their paying back the money advanced, which they must have done on a bill to set aside the agreement. *Priestly v. Wilkinson*, 1 *Ves. jun.* 214.]

[But where the plaintiff had received a promissory note, without a stamp, the court directed a proper note to be made to him, conformable to the agreement admitted by the answer. *Aylett v. Bennett*, 1 *Anstr.* 45.]

(2 C 11.) *Or, discharged afterwards.*] So, if an agreement be discharged, it shall not be afterwards decreed.

Altho' an agreement in writing was discharged by parol only. *R.* 1 *Ver.* 240.

So, if there be an agreement to pay 50*l.* for a share in the *lutestring* company, which is afterwards prohibited. 2 *P. W.* 220.

[Small deviations from a plan agreed on for building not material; otherwise, if obstinate or corrupt. *Craven v. Tickell*, 1 *Ves. jun.* 6c.]

(2 C 12.) *Or, obtained indirectly.*] So, if it is obtained by practice; as, if *A.* refuses to sell land to *B.*, and afterwards *B.* obtains an article for a sale to *D.*, at an under-value; for articles executed in equity ought to be obtained without surprise, or circumvention. *R.* 1 *Ver.* 227. *Eq. Abr.* 18. *Vide post.* (2 T 11.—3 M 1.—4 L 1.)

[If a man selling timber, asserts upon his honour that *A.* and *B.*, timber-merchants, valued it at 3500*l.*, and it appears they valued it at 2500*l.*, the agreement shall not be decreed. *Buxton v. Lister*, T. 1746, 3 *Atkyns*, 383.]

So, if, upon a purchase by *B.*, the agent of the vendor agrees, that he himself shall have one farm at such a price, or 1300*l.* *Ch. R.* 32, 3.

So, if a man upon his marriage with the daughter of *B.*, makes an agreement, that he will give to his father privately so much of the portion; it shall be disallowed in a court of equity. *R.* 2 *Ver.* 765. *Vide* 1 *P. W.* 121. 496.

So, if the daughter promises *B.*, that if he will give such a portion as was required, she will repay so much afterwards. *Vide Eq. Abr.* 88.

So, if a father takes a bond of his son to pay him so much after marriage; for it was extorted from him, by his awe of his father. 1 *Sal.* 158. *Vide* 1 *P. W.* 121.

[But if a father, and son of full age, come to an agreement to alter the limitations under a settlement, the court will not set it aside, on pretence of being drawn in by the father's authority. *Tendril v. Smith*, M. 1740, 2 *Atkyns*, 85.]

So, if a man agrees to release to the guardian of his wife, after marriage, for the peace of the family, all accounts for the mesne profits of an estate of the wife, it shall be disallowed; for every thing, which a father or guardian insists upon for his private gain, or any security for it, is extortion. *R. per Cowper*, 1 *Sal.* 158.

[If

[If two executors and trustees, one an attorney who drew the will, refuse to prove, and say they will obstruct the *cestui que trust* from administering, till he executes a deed to allow them certain sums above their legacies; tho' this deed is settled by his counsel, the court will set it aside as unduly obtained. *Ayliffe v. Murray*, M. 1740, 2 *Atkyns*, 58.]

[An agreement shall not be set aside because one of the parties was drunk, unless some unfair advantage was taken; nor a reasonable agreement to settle family disputes, because paternal authority interposed. *Cory v. Cory*, T. 1747, 1 *Vesey*, 19.]

[An agreement for the sale of land at a halfpenny for every square yard, which vendee at the time of signing knew, and concealed it from vendor, was not one fourth part of the value, is held fraudulent and void. *Deane v. Rastron*, 1 *Anstr.* 64.]

[Contract to be jointly concerned in ship-insurances is void by *stat.* 6 G. 1. c. 18. s. 12. tho' the policies are subscribed by the underwriters in their separate names; but tho' the contract could not be executed, the court would not exclude the result of it in decreeing a general account. *Watts v. Brooks*, 3 *Ves. jun.* 612.]

[So, on stock transactions, tho' the court would not execute the contract, yet where the parties have been settling stock dealings, and paying differences, they must be brought into the account. *Ibid.*]

(2 C 13.) *Or, made without proper parties.*] So, if an agreement is not made between proper parties: as, an agreement with *cestui que trust* of the surplus, without the trustees. *D. Ca. Ch.* 175.

If the husband of an executrix makes an agreement for the assignment of an annuity to creditors, but before assignment the executrix dies, the agreement shall not be decreed. 2 *Ca. Ch.* 17.

So, an agreement by three trustees only, where four are intrusted, shall not be decreed. *R.* 2 *Ca. Ch.* 202.

[One trustee for the sale of an estate having released, and conveyed to his co-trustee, refused to join in the receipt of the purchase-money: on the special expression of the deed, the purchaser was not held to the agreement with the remaining trustee; it would have been otherwise, if one had merely renounced. *Crewe v. Dicken*, 4 *Ves. jun.* 97.]

[Defendant having acknowledged by letter an agreement for sale of an estate takes it out of the *stat.* of frauds. *Tawney v. Crowther*, 3 *Bro. C. C.* 161. 318.]

[But putting deeds into the hands of a solicitor to prepare a conveyance of the estate to a son in law (after marriage) not sufficient for that purpose. *Redding v. Wilkes*, 3 *Bro. C. C.* 400.]

[A contract that the one party shall convey an estate, and the other shall grant an annuity, shall be carried into execution, tho' the vendor died previous to any payment of the annuity, one having accrued due, and having been tendred. *Jackson v. Lever*, 3 *Bro. C. C.* 605.]

[A memorial of such contract need not be inrolled under the annuity act 17 *Geo.* 3.]

(2 C 14.) *Or not, mutual.*] Or, if the remedy upon the agreement is not reciprocal. *D. Ca. Ch.* 209.

So, if a bond is given, with a penalty for the making of a settlement of an estate to such and such uses, a specific performance shall not

not be decreed; for he has relied upon the penalty. *R. Ca. Ch.* 188.

(2 C 15.) *So, failure of one party excuses the other.*] If an agreement is upon payment of lesser sums at future days, to deliver up all securities; if payment is not precisely made at the days limited, there shall not be a decree for performance. *D. Ca. Ch.* 110. *R. 1 Ver.* 210. *Ch. R.* 23.

[But articles for the purchase of an estate shall be performed, tho' the vendor did not produce his title deeds, and tender a conveyance within the time limited by the articles. *Gibson v. Paterfon*, *H.* 1737, 1 *Atkyns*, 12.]

If a devise is, that *A.*, paying the arrears of an annuity in three years, shall have an abatement of 100*l.* and all interest: if he does not pay the arrears, within three years, he shall not have the abatement. *Ca. Ch.* 52.

If an agreement is for the sale of a ship, land, &c. and possession delivered, and a bond given for the money; if the vendor afterwards refuses a conveyance, upon demand, the vendee shall have his bond delivered up. 2 *Ca. Ch.* 5. *Vide post.* (4 D 18.)

If an agreement is by articles for the assignment of a term, and afterwards, upon a debate concerning the accruing rent, counsel propose to procure another purchaser within 14 days, and he makes an assignment to *B.* on the last day of the 14; there shall not be a decree against *B.* for an assignment to *A.*, pursuant to the agreement, tho' *B.* had notice. *R. Ca. Ch.* 122.

[If an agreement is made for purchase of timber, and that articles shall be drawn with usual covenants, and the seller refuses to insert such covenants, (as to indemnify the purchaser against a stranger, on whose land the trees and hedge-rows would probably fall,) it shall not be sent to a master to see proper covenants in the case of land, but the agreement shall not be decreed. *Buxton v. Lister*, *T.* 1746, 3 *Atkyns*, 383.]

(2 C 16.) Specific Performance in the Discretion of the Court.

And in all cases, it shall be in the discretion of the court, whether performance *in specie* shall be decreed or not. *D. Ca. Ch.* 42.

And therefore, where an agreement is suspicious, the court will not decree it, nor direct that it shall be surrendered, or cancelled. 2 *Ver.* 632.

[Nor, decree an agreement for a purchase, where the title is doubtful. *Cooper v. Denne*, 1 *Ves. jun.* 565. 4 *Bro. C. C.* 80. *S. C.*]

[*A.* devised the residue of his property to his wife, in trust, to divide it among their seven children in such manner as they should deserve. One of the seven children agreed to sell her share, and covenanted to make it up a full seventh. On bill for a specific performance, the agreement was held good, and that it was not necessary for her mother to join in the conveyance. *Musprat v. Gordon*, 1 *Anstr.* 34.]

[Where by the terms of an auction, the sale is to be completed by a certain day, if neither party take any step to quicken the other till it becomes impossible to execute the agreement by the day fixed, the time is waived, and equity will interiere, to prevent the purchaser's taking advantage of it at law. *Jones v. Price*, 3 *Anstr.* 924.] [Bill]

[Bill for specific performance of an agreement to grant a lease to the plaintiff would, on evidence of his fraud, misrepresentation, and insolvency, have been dismissed with costs, if it had not been compromised. *Willingham v. Joyce, at the Rolls, 3 Ves. jun. 168.*]

[Specific performance of an agreement to build may be decreed, if sufficiently certain; but a general covenant to lay out a certain sum in a building of a certain value, cannot be so executed. *Mosely v. Virgin, 3 Ves. jun. 184.*]

[Altho' a formal mistake in a deed may be rectified by articles, of which it purports to be an execution; essential additions cannot be made to a conveyance, from articles of which it does not purport to be an execution, nor can the transaction be rescinded by the court. *Ibid.*]

[Purchaser decreed to take a title, under an obscure will amounting to a power to sell; the legal estate not being given, held to descend to the heir till execution of the power, and then to pass to the vendee. *Warneford v. Thompson, at the Rolls, 3 Ves. jun. 513.*]

[Where stock has been sold at an apparently under-price, the court will inquire into the real value previous to decreeing a specific performance. *Collet v. Wollaston, at the Rolls, 3 Bro. C. C. 228.*]

[If an agreement is not *certain, fair, and just*, in all parts, this court will not decree specific performance. *Buxton v. Lister, T. 1747, 3 Atkyns, 383.*]

[If articles for purchase of an estate is obtained suspiciously, (as of a man whose speech is lost, and understanding impaired by the palsy,) tho' the court will not set them aside, yet it will not aid in carrying them into execution; if the vendee will give them up, he shall be allowed for lasting improvements, but not if he proceeds at law and fails. *Savage v. Taylor, H. 10 G. 2. C. T. T. 234.*]

[The court will not decree a partial performance of articles; if any part is very unreasonable they dismiss the bill: but in case of mistake or fraud, they go on other ground, striking out the mistake, or setting aside the fraud, and so relieving against the settlement itself. *Gering v. Nash, M. 1744, 3 Atkyns, 180.*]

[If a bill is brought for specific performance, if the act is impossible, the court gives no relief, but leaves the party to his remedy at law. *Green v. Smith, M. 1738, 1 Atkyns, 572.*]

[In general, this court will not entertain a bill for a specific performance of articles for chattels not affecting the realty, or for merchandise; but where the agreement is not final, but to be made complete by subsequent acts, a bill to carry it into execution will be allowed. *Buxton v. Lister, T. 1746, 3 Atkyns, 383.*]

[If an uncle articles with his nephew *A.* for sale of a copyhold, for an inadequate consideration, and *A.* agrees with *C.* for sale of it for an inadequate consideration, and uncle surrenders to *A.* and his wife, and the heirs of their bodies, and remainder to *A.* in fee, the court will not decree specific performance. *Underwood v. Hithcox, T. 1749, 1 Ves. 279.*]

[If *A.* undertakes to make out the title of *B.* to an estate, and is to have part of the lands, tho' the agreement is artfully drawn by way of wager of a sum of money, and the land made only a security for it, yet the court will not decree a specific performance. *Porwel v. Knowler, M. 1741, 2 Atkyns, 224.*]

[But if *B.* afterwards by will directs the agreement to be carried into execution, the court will decree the share to *A.* from the time *B.*'s possession was quieted by injunction, without arrears of rent. *Poovel v. Knowler, M. 1741, 2 Atkyns, 224.*]

[If there is an agreement to pay a *compounded* sum at a day certain, and it is not paid, the court will not relieve, but the whole debt shall be paid. *Leigh v. Barry, M. 1747, 3 Atkyns, 583.*]

[Specific performance may be decreed against one become a lunatic since the agreement, if the legal estate is in trustees. *Owen v. Davies, H. 1747, 1 Vesf. 82.*]

[Performance shall be decreed tho' the time is lapsed, especially if the non-performance has not arisen by default of the party seeking relief. *Penn v. Ld. Baltimore, P. 1750, 1 Vesf. 444.*]

[Performance may be decreed, tho' the court cannot enforce it *in rem*, but only *in personam*. *Ibid.*]

[If *A.* and *B.* execute articles for purchase of an estate, with proviso, that if either side break the agreement he shall pay 100*l.*, and *B.* being offered two years' purchase by another, accepts it; the court will decree a specific performance. *Howard v. Hopkins, T. 1742, 2 Atkyns, 371.*]

[The rule is different as against purchasers, and between relations, in which last the court considers whether it will be attended with hardships or not, or whether a superior or inferior equity arises on the part of the person applying for a specific performance. *Goring v. Nash, M. 1744, 3 Atkyns, 180.*]

[The court will decree specific performance of marriage articles, even as to collaterals. *Ibid.*]

[If on marriage of a daughter entitled to 500*l.* on her father's death, and to real estate from her mother, it is decreed the father shall give her the 500*l.* in present, and the real estate be settled to her and her issue, then to her sister and issue, then to the father and his heirs; the right heir of the father shall have a specific performance. *Stephens v. Trueman, H. 1747, 1 Vesf. 73.*]

[On a covenant to build, the lessors are entitled to come into this court for a specific performance; but not on a covenant to repair. *City of London v. Nash, P. 1747, 3 Atkyns, 512. 1 Vesf. 12.*]

[On a covenant to rebuild, rebuilding some houses, and repairing others, or pulling down fore and back front and rebuilding, is not a performance of the covenant, for the whole must be rebuilt. *Ibid.*]

[If the lessor has seen the repairs going on for some time, without making an objection to it, he comes too late afterwards for specific performance, and the court will only give relief by an issue to try the damages. *Ibid.*]

If there is a contract for *South-Sea* stock, and the defendant by his answer offers to pay the difference, the court will not decree a specific performance. *Cont. per Master of the Rolls, but acc. per Parker upon an Appeal, 1 P. W. 570.*

[On a contract for a stock, with a deposit forfeitable on non-performance, no more than the deposit shall be recovered. *Shenton v. Jordan, 1733, Bunb. 132.*]

But if he demurs, or pleads the statute of frauds, that it was above 10*l.*, it will be over-ruled. *2 P. W. 305.*

So,

So, if there is an agreement for a copyhold with tenant for life, and part of the money is paid, but before the residue is paid, the tenant for life dies, his executor shall return the money received, altho' delay of the performance was by the default of the plaintiff. *R. 1 Ver. 472.*

If there is an agreement for a purchase, and part of the money is paid, and then an order by consent is made, that the residue of money shall be paid on such a day, or that the money paid shall be lost, and the articles cancelled: if the money is not paid at the day, the court will enlarge the time; for the order was only for security of the payment. *2 P. W. 66.*

(2 C 17.) In what Manner an Agreement shall be decreed to be executed.

An agreement shall be decreed according to equitable construction, in pursuance of the intent of the parties, and not according to the words; as, if by marriage articles, the father covenants, upon payment of the portion to him, upon the marriage of his son, that he will settle a jointure upon the wife and her issue, and the wife dies without issue; the father, having the portion, ought to make a proportionable settlement on his son. *Semb. 1 Ver. 199.*

[In case of a bill for specific performance against the vendor, the vendee or his heir being in possession, (the agreement having been made by the tenant for life with the reversioner,) and an account of the purchaser's personal estate becoming necessary, an early day shall be appointed for the payment of the purchase-money, and on failure, the bill *quoad hoc*, to be dismissed. *1 Brown. Ch. Rep. 396.*]

[If a rector agrees with a parishioner for a certain sum, payable yearly at *Michaelmas*, and dies before it; his executor shall have a proportion of the sum to the time of his death. *Anon. M. 1730, Bunb. 294.*]

[If a man by articles previous to his marriage, agrees to settle lands in S. to himself and wife for life, and the life of survivor, remainder to the heirs of their two bodies begotten, with remainders over, and afterwards makes a settlement of these lands in the same words, and has issue a son and two daughters, and on the son's marriage settles other lands on him in the usual manner, and after the son's death levies a fine of the lands in S. to the use of himself in fee, and afterwards devises the lands to his daughters, and all his other lands to trustees for his son's son for life, with usual remainders; the grandson is not bound by the deed, which tho' in the same words is of different import to the articles; but he must make his election, and if he chuses the lands which ought to have been settled, his aunts (the daughters) shall be reprimed out of the lands devised to him. *Stratfield v. Stratfield, H. 9 G. 2. C. T. T. 176.*]

[If by settlement before marriage securities are assigned to a trustee, to be laid out in purchase of freehold to be settled to the first son in tail male, remainder to second and other sons, remainder to daughters in tail, and the father and mother die before the money is invested in freehold, leaving several sons and daughters; the court will order the money to be laid out in land, and settled accordingly, in

in order to give the remainder-men their chance, unless they consent in court, and then it will order the money to be paid to the eldest son. *Collet v. Collet*, P. 1749, 1 *Atkyns*, 11.]

[If a man under articles to purchase and settle, purchases but does not settle, they shall be decreed to be settled accordingly to make good the articles; if freehold, not if copyhold. *Whorwood v. University College*, T. 1750, 1 *Ves.* 534.]

[If *A.* in marriage articles recites he is to be entitled to all *B.* his wife's personal estate; therefore, for further provision, covenants, that for any sum to come to her afterwards, he will make further settlement in proportion of 100*l.* for 1000*l.*, and if no issue, then *B.* to be paid back half such sums as *A.* should receive or become entitled to in her right; and they bring a bill for her share of her grandfather's estate, obtain a decree, and *A.* is offered 400*l.* by the person in whose hands it is, but refuses to accept it, and does not act under the decree, and dies without issue; *B.* is entitled to 40*l.* *per annum*, and half of the 400*l.* *Prime v. Stebbing*, T. 1752, 2 *Ves.* 409.]

If there be an agreement for a lease of lands in the county of *N.*, where the lessor usually repairs, at 30*l.* *per ann.*, without saying who shall repair, if it appears that the land is of greater value, it shall be decreed that the lessee shall take a lease, and do the repairs, and pay 30*l.* *per ann.* without deduction, except for taxes by parliament. *R. 2 Ver.* 231.

[If on application to the court of aldermen for licence for *A.* to marry a city orphan, they require him to take up his freedom, and the marriage takes effect, but he dies without taking up his freedom, the court will direct his estate to be distributed according to the custom, altho' there was another complete agreement between *A.* and his father, and the orphan and her relations, previous to the marriage, in which the freedom is not mentioned. *Frederick v. Frederick*, T. 7 *G. Str.* 455.]

[If *A.*, tenant for life, lets a building lease to *B.* for 61 years, by virtue of an act of parliament, with liberty to *B.* to quit after 20 years, on notice; but the covenants usual in building-leases are not inserted, and *B.* is expressly exempted from rebuilding in case of fire; *B.* assigns to *C.* who builds, and pays rent to *A.* till he dies, and then to *D.* his son and first remainder-man in tail, who accepts it during six years, and then ejects for want of the usual covenants: this court will order new lease with the usual covenants, and decree quiet possession to *C.* *Stiles v. Cowper*, H. 1748, 3 *Atkyns*, 692.]

[Contracts for merchandise are to be construed according to the usage of trade. *Baker v. Paine*, P. 1750, 1 *Ves.* 456.]

[So, if by marriage articles, it is covenanted that *A.* will settle an estate, and by the settlement shall covenant, that it is free from incumbrances; if a known incumbrance is upon the estate, equity will not enforce a discharge of it, or a collateral security to be given against it, before the parties are thereby actually prejudiced; for by the deed the parties seemed to be content with their covenant. *Eq. R.* 6.]

So, if the covenant is, that the party shall covenant that *B.* shall enjoy free from incumbrance. *Eq. R.* 8.

Otherwise,

Otherwise, if the incumbrance was concealed from the parties, and afterwards discovered; for that is a fraud. *Eq. R. 7.*

[So, where an agreement was made for the purchase of marsh land for 100*l.*, the annual value being represented to be 90*l.*, and no notice was taken of a necessary repair of a wall to protect the estate from the *Thames*, which would be an expence of 50*l.* *per ann.* the concealment of this circumstance will prevent a decree for a specific performance. 1 *Brown. Ch. Rep.* 440.]

[Houses purchased in *London* are not a satisfaction of a covenant in marriage articles; tho' farm-houses, &c. which go along with the estate may. *Pennel v. Hallet, P.* 1751, 2 *Ves.* 276.]

[If *A.* covenants that 100*l.* *Scuth-Sea* annuities, and a note from *C.* shall be paid to *B.* if he survives, and *A.* aliens part of these sums, he shall give security that the sums shall be forth-coming. *Flight v. Cook, T.* 1755, 2 *Ves.* 619.]

[If an agreement to let plaintiff into a trade is decreed to be performed, the court will not decree an account of the profits from the time he ought to have been let in, tho' he might have had damages for it at law. *Anon. T.* 1755, 2 *Ves.*]

[Articles of agreement may be rectified by the minutes. *Baker v. Paine, P.* 1750, 1 *Ves.* 456.]

[On agreement for the purchase of an estate for 100*l.* and for an annuity, it was not specified how the annuity should be secured; the court directed it to be by security on the estate, as well as by bond and judgment. *Remington v. Deverall, 2 Anstr.* 550.]

[Agreements for selling estates, especially at auctions, shall not be impeached for trifling errors in the description: where the advertisement described all the estate to be freehold, when a small part was held at will; and after an execution of articles, a treaty for an exchange of that part took place, pending which, at the time appointed for completing the purchase, purchaser took forcible possession, and proceeded in the treaty afterwards, till he finally refused to agree to the purchase: on bill by vendor the purchase money was decreed to be paid with four *per cent.* interest for the time stipulated for payment, but inquiry directed as to what ought to have been the compensation at that time for the part not freehold, which, with the outgoings, was to be deducted. *Calcraft v. Reebuck, 1 Ves. jun.* 221.]

[In a bill for a specific performance of an agreement for the sale of a lease, the court cannot apportion the price according to the time elapsed after the making of the same. *King v. Wightman, 1 Anstr.* 80.]

[On an agreement for a lease, "with all usual and reasonable covenants," a covenant not to underlease, or assign, is implied where the custom of the place is not generally against it. *Folkingham v. Croft, 3 Anstr.* 700.]

[Agreement in writing between landlord and tenant, signed by the landlord for a new lease, to be granted at any time after the completion of repairs to be made by the tenant with all convenient speed, but blanks were left for the day of the commencement: the repairs being completed, the landlord tendred a lease to commence from that time, and on refusal filed a bill: the answer admitted, that the agreement was accepted; but insisted, that the new lease was not
Vol. II. A a

to commence till the expiration of the old; and so it was decreed, parol evidence being refused. *Pym v. Blackburne*, at the Rolls, 3 *Ves. jun.* 34.]

[On an agreement to purchase, of devisees in trust to sell, persons entitled to the purchase money subject to debts, legacies, and other charges, ought not to be parties to the conveyance; and if they were, their covenant ought to extend only to their own acts and those of the devisor, not to a general warranty, without a special contract for that purpose. *Wakeman v. The Dukes of Rutland*, 3 *Ves. jun.* 233. 504. Decree affirmed in *Dom. Proc.* 1798, and on 28th July 1798, on farther directions a specific performance was decreed with costs.]

[Money paid in as earnest at a sale of an estate, and ordered to be laid out in the funds, is part payment of the purchase money, and the vendor must abide by the rise or fall of the funds. *Poole v. Rudd*, 3 *Bro. C. C.* 49.]

[Altho' a partnership agreement may alter the nature of real estate, yet it must be express so to do. *Thornton v. Dixon*, 3 *Bro. C. C.* 199.]

(2 D) Alimony.

(2 D 1.) When it shall be decreed.

Chancery will compel the husband to give alimony to his wife. 1 *Ch. R.* 44. 164. *Dub. Eq. R.* 1. *Adm. cont. Eq. R.* 153. *Vide Eq. Abr.* 67.

Such decrees were introduced in the time of the rebellion, and confirmed by the *st.* 12 *Car.* 2. 12. *f.* 1. for confirmation of judicial proceedings. *R.* 1 *Ch. R.* 187. 224. 2 *Sho.* 282.

If the wife is separated by the cruelty of the husband, and afterwards 6000 *l.*, part of her portion, is prayed to be vested in lands, to be settled pursuant to articles, upon the husband for life, &c. the court will direct, that they shall be settled for the separate use of the wife, until cohabitation. *R.* 2 *Ver.* 493.

[If *A.* marries *B.* with a good fortune, and previously draws and gives her a bond to secure 1700 *l.* if she survives; *B.* behaves indecently, *A.* uses her cruelly, *B.* leaves him, *A.* breaks open her cabinet, and takes the bond, *B.* brings bill for separate maintenance, *A.* after answer leaves the kingdom; the court will order what remains of the wife's fortune to be placed out in a trustee's name, the interest to be paid during the joint lives to the wife for her maintenance, till *A.* returns and maintains her, and 1700 *l.* to be secured for her if she survives. *Watkins v. Watkins*, *M.* 1740, 2 *Atkyns*, 96.]

So, an additional portion, which accrues to the wife after separation. *R.* 2 *Ver.* 671.

So, the interest of a bond for part of the portion where the husband is extravagant. *R.* 2 *Ver.* 752.

So, if the husband has a trust-estate which remains under the direction of Chancery, the court will decree alimony to the wife, after a divorce *propter sevitiam*. *R.* 4 *Ann. Eq. R.* 1.

So, if there is an agreement for a separate maintenance, Chancery will decree the performance. *R.* *Eq. R.* 152.

[On a bill to establish an agreement for separate maintenance, when the

the wife has sworn the peace, and the husband by his answer says he is desirous of cohabiting, the court will on motion order him to pay a gross sum for the time they have been separate till the answer came in; and this abstracted from the decree that may be made. *Head v. Head, H. 1745, 3 Atkyns, 295.*]

[If the husband says, by letter to the wife's father, "I will allow so much while we continue separate," and the husband under pretence of insanity, has endeavoured to shut her up in a madhouse, and she has thereupon obtained a *supplicavit*, and the husband still says he thinks her mad, and, if she returns, shall treat her as such, but still offers to receive her; the court will order the arrears to be paid; if she returns in a month, the maintenance to cease; if she returns, and he does not receive and treat her as a wife, the maintenance to continue. *Head v. Head, T. 1747, 3 Atkyns, 547. 1 Ves. 17.*]

So, an agreement for pin money shall be decreed to be performed.

And if the husband dies, the pin-money being in arrear for a year and three quarters, the arrears shall be decreed to the wife. *R. Eq. Abr. 140. Vide Eq. Abr. 66.*

(2 D 2.) When not.

But alimony shall not be decreed, except where there is a separation. *Ca. Ch. 251. Mo. 874.*

And if alimony is decreed, it may be suspended, if the husband by a new bill offers cohabitation. *Ca. Ch. 251. Eq. Ca. 6. (2d part of 2 Mod. Ca.) Eq. Abr. 67.*

But such offer shall not discharge the arrears of the alimony. *R. Ca. Ch. 251.*

So, if the husband by his answer offers cohabitation, the wife shall not be aided in a settlement for alimony, beyond what the law will aid her. *1 Ver. 53.*

Yet, if by practice the tenants surrender to avoid a remedy by law, the court will give relief, so far as to put her *in statu quo*, &c. *1 Ver. 53.*

So, if there is an agreement that the husband and wife shall separate, and the husband gives security to repay the portion to the father of his wife, being discharged from the maintenance, and debts of his wife, and their children, the husband shall not be relieved against that security, upon an offer of cohabitation and payment of the maintenance till that time. *R. 2 Ver. 386.*

[The court cannot make a decree establishing a perpetual separation between husband and wife, or to compel him to pay her a separate maintenance, unless upon an agreement between them, and then unwillingly. *Head v. Head, T. 1747, 3 Atkyns, 547. 1 Ves. 17.*]

[In case of elopement and adultery, the court will not grant separate maintenance; but the proof must be full. *Watkins v. Watkins, M. 1740, 2 Atkyns, 96.*]

[Depositions to prove criminal conversation cannot be read, unless it is charged in the answer; but it is not necessary it should be in gross terms. *Ibid.*]

(2 D 3.) When in the Ecclesiastical Court.

The ecclesiastical court is the more proper court to decree alimony. *Litt.* 78.

And therefore, where an application was made for it to the judges of assize, they recommended it to the bishop. *Litt.* 78.

And if the bishop orders alimony, which is confirmed by the court of the marches in *Wales*, the confirmation is void. *Semb. Litt.* 79. [*Vide Annuity.*]

(2 E) Apportionment.

IF a rent be reserved upon a lease, it may be apportioned in equity, when it shall not by law; as, if common is recovered out of part of the land demised, tho' the land itself is not evicted, yet the rent shall be apportioned, if after the recovery the rent reserved is too great. *Semb. Ca. Ch.* 31. *Vide post.* (4 N 5.)

What shall be an apportionment at law, *vide Suspension* (E).

So, if a parson, incumbent of a rectory, and the grantee of the next avoidance, join in a lease of tythes, the rent to be paid at *Easter* and *Martinmas*, and the parson dies before *Martinmas*, the lessee having collected the greatest part of the tythes, equity will apportion how much rent shall be paid to the executor of the parson, and how much to the grantee. *Semb. 2 Ver.* 204.

If monies are secured by mortgage to be vested in land for him and his heirs, and the interest, payable at *Lady-Day* and *Michaelmas*, to be paid to the person entitled to the land; if the mortgagee dies before *Michaelmas*, tho' the rent due at *Michaelmas* would have been all paid to the heir, the interest shall be apportioned between him and the executor. *2 P. W.* 176.

[But if money settled to be laid out in land, and till then to be vested in *South-Sea* annuities, the profits to go as the rent of the land would, and the person who would be tenant for life dies in the middle of a quarter; there shall be no apportionment of the dividend. *Wilson v. Harman, T.* 1755, *2 Ves.* 672.]

[Because by act of parliament the dividends on these annuities are made payable on certain days.]

If a portion is bequeathed to a daughter to the age of 18, or marriage, and a maintenance of 80*l.* per ann. in the interim, by half-yearly payments at *Lady-Day* and *Michaelmas*, and she arrives at the age of 18 on the 16th of *August*; her maintenance shall be apportioned and paid up to the 16th of *August*. *R. 2 P. W.* 501.

But if a man settles a rent-charge for the jointure of his wife, and afterwards devises part of the land to her, without saying, that it shall be in lieu of any part of the rent; the rent shall not be apportioned. *R. 1 Ver.* 347.

If a man devises to *A.* in tail, remainder to *B.*, and if the estate comes to *B.*, he shall pay 100*l.* to his daughters; if *A.* suffers a recovery of a moiety, and then dies without issue, whereby the other moiety comes to *B.*, he shall pay the whole 1000*l.*, and it shall not be apportioned; for the daughters claim paramount to *A.* who suffered the recovery. *2 Ver.* 360.

[If there be tenant in tail in possession, and tenant in tail in remainder,

mainder, and tenant in tail die before the day when the rent becomes due, rents paid to receivers, by tenants by demise determinable on the decease of tenant in tail without issue, shall be apportioned between the representative and remainder-man. 2 *Brown. Ch. Rep.* 659.]

When there shall be an extinguishment, *vide post.* (4 N 6. 8, 9.)

(2 F) Appointment.

(2 F 1.) What sufficient to charge Land.

ANY signification of an intent, to make a charge upon land, is sufficient to subject the same land to other equitable charges; as, if a man devises that his wife shall have land in *B.* to the value of the portions charged upon her jointure, if she pleases; if she refuses, &c. the portions shall be charged on the land in *B.* *R. 2 Vent.* 363.

[If a wife has a power, in case she survives her husband, and has no younger children, to dispose of 4000*l.* charged on real estate, by writing executed before three witnesses, and before her second marriage appoints, before two witnesses only, 2000*l.* to the use of her intended husband; the court will supply this defect, as it is for valuable consideration, and only the execution of a trust. *Sergison v. Sealey, M. 1742, 2 Atkyns, 412. Vide 1 Brown. Ch. Rep. 363.*]

[But if the appointment is by will, before two witnesses only, as it is voluntary and without valuable consideration, it is void, and the money sinks into the real estate. *Ibid.*]

[Where there is a power to appoint a real or personal estate, by deed or will, and the appointment is made by will not attested so as to pass real estate, yet the appointment shall be good as to the personalty. 1 *Brown. Ch. Rep.* 147.]

If a man settles land for the jointure of his wife, and agrees that she shall have the land, till his heir pays 100*l.* to her executor, administrators, or assigns; if she by will, in the lifetime of her husband, gives the 100*l.* to *A.*, it shall be a good appointment. 1 *Ver.* 244, 5.

If a man upon his marriage settles land to the use of himself for life, and afterwards to his wife for life, remainder to the heirs of his body by his wife, remainder to his own right heirs; proviso, that if there is no issue of their bodies, *B.*, the feoffee, shall convey as the survivor shall appoint; this operates as a proviso to revoke, and limit new uses; and *B.* shall convey as the wife surviving appoints, tho' the husband by his will had devised the land to other uses. *R. 2 Ver. 376.*

If there is a devise to trustees to convey to an infant and his first, second, and other sons in tail, and if he dies without issue, that *B.* shall have the estate for life, and afterwards *A.* shall have it to him and his heirs, but if *A.* dies before the estate devolves to him, it shall be conveyed to his heir, if *A.* devises it by his will it shall be a good appointment, and the devisee shall have it. *Per King C. temp. Geo. 2. 8.*

[If *feme-covert*, having power to receive profits of an estate to her separate use, bring bill jointly with her husband for account, and

submits they shall be applied to pay his debts, and it is decreed accordingly, it is a good appointment. *Allen v. Papworth, M. 1748, 1 Vesey, 163.*

[Where the words "from time to time" were inserted in a power to appoint rents and profits of the real, but omitted in the power to appoint the produce of the personal, there may be a sweeping appointment of the whole, the power extending to the whole after the appointer's death. *Semb. 1 Ves. jun. 194.*]

[Under a power of appointing a real estate "to the use of such child and children," &c. (and where, in default of appointment, the estate was settled to the use of all and every the child and children,) an exclusive appointment to one is good. *1 Term Rep. 432. Swift v. Gregson. See 2 Vern. 513. 1 P. Wms. 149. 1 Atk. 389. 1 Mod. 189. 2 Vern. 640.*]

[An appointment ought to prevail, so far as the power of appointment extends, and to be void as to so much as exceeds the power of appointment. *Cowper, 651. Adams v. Adams.*]

(2 F 2.) What Appointment to the Person is sufficient.

So, if a man bequeaths the goods of such a house to *A.* for life, and afterwards to the heir of *B.*, and by the same will, in another part, mentions the person who was the heir; the executor of such heir, if he dies before *A.*, shall take, and not he who was heir at his death. *R. 1 Ver. 35.*

If a term is assigned to *A.* for life, and afterwards to his issue, the term shall not all be in *A.*, for by the appointment to the issue, all the issues take by purchase. *2 Ver. 24.*

So, if a term, upon marriage, is assigned in trust for the husband for 99 years, if he live so long, and afterwards to the heirs of the body of the husband by his wife; the husband doth not take the whole term, but it shall be an appointment to the issues of the husband and wife. *R. 2 Ver. 23.*

So, if upon a marriage, a term is assigned to the husband for life, then to the wife for life, and afterwards to the heirs of the body of the wife by her husband, the words *heirs of the body of the wife* are an appointment to the issues of the marriage, who shall take, and the estate does not vest in the wife. *Cont. per Lord Chancellor Jefferies, but the decree was reversed by the Lords Commissioners, and the reversal affirmed in parliament. 2 Ver. 43. 196. R. 2 Ver. 362.*—Otherwise if it had been to the heirs of the body of the husband and wife. *R. cont. per Master of the Rolls, but upon appeal R. acc. 2 Ver. 668.*

But a limitation of the trust of a term for years to the heir of the termor, after a limitation to one not *in esse*, does not amount to an appointment of the trust to the heir, but it reverts to him who made the trust. *Ca. Ch. 8.*

If a woman, before her marriage with *A.*, covenants to stand seised, to the use of herself in tail, and afterwards to such uses as she shall appoint, and for default of such appointment, to *B.* her cousin; and by her will she appoints the estate to *A.* and his heirs; this being a void use in law, shall not be decreed, as an appointment in equity. *R. 2 Ver. 8.* but a *qu.* is there made.

[If *A.* suffers a recovery, and declares it shall enure to the use of himself, his heirs and assigns, and to such uses, &c. as he by will shall appoint,

appoint, and by will he appoints to the use of *B.* and *C.*, this is good, and not a use upon a use; for *and* shall be construed *or*. *Dobbins v. Bauman*, *M.* 1746, 3 *Atkyns*, 408.]

[Devise of personal estate for life, then among all the children of devisee, in such shares and manner, for such interests, with such survivorship, and to vest at such time as devisee for life should by deed or will appoint; in default of appointment of the whole, or part, equally; if but one, to that one payable at 21; nevertheless, the shares of any attaining 21 in the lifetime of devisee for life, to be vested; but payment to be postponed till her death; that clause, vesting an interest at 21, held to relate only to the case of default of appointment; and one of two children being dead without issue after 21, and without receiving any share, that circumstance will not prevent an appointment of the whole fund to the survivor. *Boyle v. Bishop of Peterborough*, 1 *Ves. jun.* 299. 3 *Bro. Ch. Ca.* 243. *S. C.*]

[An illusory share may be accounted for by circumstances. *Ibid.*]

[Trustee to appoint cannot appropriate part of the sum appointed to himself; but may recal it into the original fund. *Ibid.*]

[Fund given to *A.* for life, with power of appointment during life, and after death, for want of appointment, over; it is not a vested interest till after the death of the tenant for life, the power subsisting upon it. *Ibid.* 309.]

(2 F 3.) When it shall be defeated.

[If a father, having power to appoint 3000 *l.* among his younger children, appoints 2900 *l.* to one, subject to certain devises in his will, it is a void appointment, for he cannot annex a condition. *Pawlet v. Pawlet*, *T.* 21 & 22 *G.* 2. 1 *Wils.* 224.]

If there is an appointment, it may be defeated by matter *ex post facto*: as, if trustees have a power to distribute 4000 *l.* amongst younger children, in such proportion as *A.* shall appoint; *A.* appoints 2000 *l.* to the second son, and afterwards the estate comes to him by the limitations of the settlement; tho' the appointment was good, when made, yet it is defeated by the descent of the estate; for the second son had a defeasible capacity, and took *sub modo*, viz. as a younger child, but by the descent of the estate, he became eldest son within the intent of the settlement. *Per Lord Keeper Cowper*, *H.* 4 *Ann.* in *Sir Thomas Dolman's Case*, 2 *Ver.* 528. [*Vide* 1 *Brown. Ch. Rep.* 77.]

So, if no appointment is made, the court will make an appointment.

And if distribution is to be made to the children of *B.*, after the death of *A.*, in such manner as *A.* appoints, who dies without making any appointment, and some of the children of *B.* are dead, leaving issue; the court will direct a distribution *per stirpes*, and not *per capita*. 2 *Ver.* 50.

[If a man leaves 600 *l.* to his wife, to be by her disposed of among his three daughters, in such proportion, and payable in such manner as she thinks fit, and she gives 200 *l.* thereof to her daughter *A.*, who is dead, it is void, even if *A.* had left children. *Maddison v. Andrew*, *M.* 1747, 1 *Vesey*, 57.]

[For default of appointment of the whole, or any part, such unappointed part goes equally among those alive at the mother's death. *Ibid.*]

[The discretionary power of a parent to appoint does not devolve on the court for want of appointment. *Maddison v. Andrew*, M. 1747, 1 *Ves.* 57.]

[Where a power is given to a man to make an appointment by will, and in default of such appointment, that all the children shall take equally share and share alike, and he make an elusory appointment, it is as no appointment, and the children shall take equally. 1 *Brown. Ch. Rep.* 450.]

[As, where by marriage settlement, after other estates, remainder was given to the use of all and every the child and children of the body of the husband, on the body of the wife to be begotten, in such parts, shares, and proportions, and for such estate and estates, not exceeding estates in tail, as the husband by deed or will should appoint, and he, reciting this power, by will duly attested, limited one acre of the premises to his eldest son and a daughter for their lives, and the life of the survivor, with remainder to such person or persons as should be entitled to the residue of the said premises, and then limited the residue to his second son for life, remainder to trustees, &c. remainder to his first and other sons in tail, with remainders over. This was held to be elusory.—1st, Because he had given but one acre to a son and daughter between them; and 2dly, Because he had extended the appointment to grandchildren; and that therefore the estate must go among all the children agreeably to the direction in default of execution of the power. *Ibid.*]

[By articles, the wife's fortune, and an equal sum advanced by the husband, were agreed to be settled on the husband for their joint lives, and if he should die first, leaving issue by her, on her for life; after her decease, as to the capital, in such manner as he should appoint, in default of appointment to be divided equally among the issue at 21, with maintenance and survivorship: after marriage, in pursuance of the articles, an estate purchased with the fund was settled on the husband for the joint lives of him and his wife, remainder to trustees to preserve, &c. remainder in case of his death, first without issue to certain uses; remainder in case of his death first, leaving any child or children, to the wife for life; remainder to all the child or children, in such shares as the husband should appoint; for want of appointment, equally in tail, with cross-remainders, remainder to the heirs of the husband. Children only are the objects; and an appointment to a child for life, remainder to his children as he shall appoint, is an excess of power, and the doctrine of *cy pres*, by giving the child an estate-tail, is not applicable; but the appointment is void for the excess only, and what is ill appointed goes as in default of appointment. *Bristow v. Warde*, 2 *Ves. jun.* 336.]

[A power of appointment by will, is not executed by a mere devise of the residue. *Buckland v. Barton*, C. P. E. 33 *Geo.* 3. 2 *H. Bl.* 136.]

[If A., under a will, has the interest of money for life, with a general power of appointment, the appointee does not take under the appointor, but under the original will. *Anstr.* 365. *Vide post.* (2 M 12.)

(2 G) Affets. [*Post.* (3 P).]

(2 G 1.) What shall be.

WHAT things shall be said to be affets at law, *vide in Affets.*[An advowson in fee in gross is real *affets* by descent. *Robinson v. Tonge*, M. 4 G. 2. Str. 879. 3 P. W. 398. *Qu.* If it is extendible? *Westfaling v. Westfaling*, H. 1746, 3 Atkyns, 460.][A fire engine set up for the benefit of a colliery by tenant for life is personal estate, and shall go to the executor: so, a cyder-mill let in very deep into the ground. *Lawton v. Lawton*, M. 1743, 3 Atkyns, 13.][An office, (as housekeeper of the palace and house of lords,) granted for years, is liable to debts, and a fee, being an allowance by lord chamberlain's warrant, for particular purposes, is part of the office, tho' a voluntary grant of the crown, and tho' it may be varied. *Schellenger v. Blackerby*, M. 1749, 1 Vesey, 347.][If A., tenant for life, remainder to his sons in tail, remainder to his nephew B. in tail, remainder over, lets in B. immediately, on his agreeing to permit A.'s appointee to receive the rents for as long time after A.'s death as he, B., shall enjoy them during A.'s life; this is part of A.'s general affets, tho' he has appointed to a daughter unprovided for, and B. shall suffer a recovery. *Ld. Townshend v. Windham*, T. 1750, 2 Vesey, 1.]

If a man dies seised of an estate in land, to him and his heirs, lying in the foreign plantations, it shall be affets. R. 2 Vent. 358. 2 Ca. Ch. 145.

If an executor puts out money of the testator at interest, the interest received shall be affets. *Cont.* for the executor was at the hazard of losing the principal. 2 Ca. Ch. 35. R. Acc. 2 Ca. Ch. 152.If a man purchases land in another's name, in trust for him and his heirs, it shall be affets in equity in the heir. R. *cont. per tres Judges*, tho' the trust was decreed to the heir. Ca. Ch. 14.—R. *cont. upon Demurrer*, Ca. Ch. 128. Dub. 1 Ver. 173.But now, by the *st.* 29 Car. 2. 3. a trust in fee-simple is made affets, yet so that the heir, by false plea, confession, or *nihil dicit*, &c. shall not be liable to the debt out of his own estate.

R. That it is affets in equity. 2 Ch. R. 145.

If land is conveyed in fee in trust for A. and his heirs, and a term for years is conveyed to A. in trust to attend the inheritance, this term shall be affets for the debts of A. 2 Ca. Ch. 49. 152. Acc. If no trust of the term is declared. 1 Ver. 188, 9. 340, 1. Eq. Abr. 241.

So, if the inheritance is conveyed to A. himself, and the term is assigned to a stranger upon trust to attend the inheritance, the term shall be affets for the debts of A. R. 2 Ch. 152. *Cont.* 2 Ca. Ch. 49. Acc. 1 Ver. 1. 104. *Semb.* Ch. R. 64. *Vide post.* (4 W 22.)

If a man, by covenant, &c. binds his heir, and afterwards conveys land to his heir in fee; it shall be affets in equity. R. 1 Ch. R. 18.

If a man devises lands to his executor, for the payment of debts, they are affets. 1 Ver. 64. *Vide post.* (3 A 3, &c.) [They are equitable affets. 1 Brown. 140. n. (+).]

[So also, where testator directed that all his estates should be sold, and

and after payment of certain sums, the remainder to be vested in his executors for the payment of debts. 1 *Brown*, 135.]

[So, on a devise to sell for payment of debts, the residue to be part of the personal estate: this shall be equitable assets. 2 *Brown*, 94.]

[If an executor is also made trustee in a devise for payment of debts, the assets shall be equitable, and the creditors paid *pari passu*. *Lewin v. Okely*, T. 1740, 2 *Atkyns*, 50.]

If tenant in tail levies a fine, and makes a mortgage for 1000*l.*, and afterwards devises his lands in the same county for payment of debts; a term in trust to attend the inheritance, shall be assets, if the fine does not declare the uses after the mortgage paid, to be to the former uses. 1 *Ver.* 100.

If a copyhold is surrendered to the use of a man's will, and he devises it to his executrix for life, paying his debts, and that she shall pay 50*l.* to his heir; the whole shall be assets for payment of debts, and the executrix may sell to such intent. R. 1 *Ch. R.* 203.

[If a copyholder in tail accepts a grant from the lord, of the freehold and fee-simple, the entail is extinct, and the estate is assets by descent. *Dun v. Green*, T. 1724, 3 *P. W.* 9.]

If a term for raising a portion for *A.* is merged by the descent of the inheritance, it shall be revived for the benefit of creditors. R. 2 *Ver.* 91. 208.

If there is a mortgage in fee, and the equity of redemption descends to the heir, it shall be assets in equity. *Dub. Ca. Ch.* 148. 1 *Ver.* 410, 411. R. 2 *Ver.* 55. 61, 2.

[If one possessed of a term for years, mortgages it, and dies leaving bond and simple contract debts; the equity of redemption is equitable assets, and liable to all the debts equally. *Case of Sir Charles Cox's Creditors*, M. 1734, 3 *P. W.* 341.]

[But where a bond is given to *B.* in trust for *A.*, or if a term of years be taken in the name of *B.*, in trust for *A.*, it shall be paid in a course of administration. *Ibid.*]

[If a simple contract creditor obtains a decree that he and the rest of the creditors should come in before the master, and be paid all their debts; a bond creditor coming on the foot of the decree shall be paid only *pro rata* with the simple contract creditors. *Ibid.*]

[And *semb. per Jekyll*, M. R. if bond creditor having notice of such decree, and advertisement in Gazette, shall lie by, and afterwards bring action against executor, tho' executor could not defend himself at law, yet equity would assist him, and compel the bond creditor to accept in proportion with simple contract creditors. *Ibid. Sed quare?*]

[If *A.*, by articles on his son *B.*'s marriage, covenants in three years to pay 12,000*l.* to be settled to *B.* for life, to his wife for life, to sons in tail male, to daughters in tail general; provided, if no child but one daughter, and *B.*'s heirs should in three months after his death pay 4000*l.* to trustees, then the uses limited to the daughter and her heirs in the 12,000*l.* to cease, and to be to *B.* his heirs and assigns: *B.* dies, leaving only one daughter, and devises the 12,000*l.* subject to the trusts to *A.*, and makes him executor, and he does not pay the 4000*l.* in three months; yet the reversionary interest of *B.* in the 12,000*l.*, and the right of redeeming it by the payment of 4000*l.*, shall

shall be real assets, and liable to the payment of a judgment creditor. *Frederick v. Aynscombe*, M. 1739, 1 *Atkyns*, 392.]

If a man articles for the purchase of land, the money shall be decreed for the purchase for the benefit of the heir. R. 1 *Sal.* 154.

But if there is a deficiency of personal assets for payment of debts upon simple contract, &c. the money shall be assets in the hands of the executor for that purpose. *Semb.* 1 *Sal.* 154.

[An estate, made subject by will to a term for payment of debts, must first be applied before creditors can come on the estate descend to the heir at law. *Powis v. Corbet*, T. 1747, 3 *Atkyns*, 556.]

[Assets descendable on the heir at law must be applied before lands specifically devised. *Ibid.* *Chaplin v. Chaplin*, T. 1735, 3 *P. W.* 365.]

[A man cannot possibly raise a fee-simple to his own right heirs by the name of heirs as a purchase, so as to prevent the reversion being assets. *Godolphin v. Abington*, M. 1740, 2 *Atkyns*, 57.]

[If administrator *de bonis non* finding the outgoings of a college lease to exceed the profits, neglects to renew, and suffers the heir at law of testator (whose lands lie intermixed with the leasehold) to renew, such heir will be liable to pay the debts if the rest of the personal estate falls short. *Semb.* for the lessee in a new lease, taking in the right of the old, must take it subject to all the equity to which the original lessee was liable. *Edwards v. Lewis*, T. 1747, 3 *Atkyns*, 538.]

[If *A.* gives several legacies, and makes *B.* executor and residuary legatee, and he receives all the assets, and with the money buys land, and also the equity of redemption of an estate on which testator had a mortgage and dies, the lands and the equity of redemption so purchased shall be assets, and liable to the legatees of *A.* *Ryall v. Ryall*, H. 1739, 1 *Atkyns*, 59.]

So, if a mortgage be to *A.* and his heirs for the life of *B.* upon condition that if *B.* pays 100 *l.* it shall be void; this estate *pur auter vie* would have been assets for the executor of *A.* before the *stat.* 29 *Car.* 2. 3. 1 *Ch. R.* 39.

[An estate *pur auter vie*, tho' it is devised, is liable to specialty debts; for the devise is void by the statute of fraudulent devises. *Westfaling v. Westfaling*, H. 1746, 3 *Atkyns*, 460.]

If an heir sold the estate descended before any action commenced, the money would have been assets in equity before the *stat.* 29 *Car.* 2. *Dab.* 1 *Ver.* 282.

So, if the heir for money release his equity of redemption, the money is assets. 2 *Ver.* 62.

If by marriage articles money is to be vested in a purchase for the husband and wife, and their children, afterwards to the heirs of the husband; after the death of the husband and wife without issue, the money is assets, and goes to the executor or residuary legatee. R. 2 *Ver.* 295.

If a husband assigns an estate to which his wife was entitled as executrix, to trustees to the use which he shall appoint, and afterwards by his will devises it to his wife and children; it shall be assets in the first place for the payment of his debts, and the wife and children take only as legatees. R. 2 *Ver.* 287.

If *B.* upon a purchase from *A.* gives a bond to pay 500 *l.* as *A.* shall

shall appoint, who by his will appoints the 500*l.* to be paid to his relations; the 500*l.* shall be assets for the creditors of *A.*, for he had the disposition of it. *R. 2 Ver. 319. 465.*

[If by articles before marriage of *A.* and *B.* it is agreed that 300*l.* shall remain charged on land till laid out in purchase of lands to be settled to *A.* for life, to *B.* for life, and if no children, as *B.* shall direct, and *B.* directs it to *A.* to be employed in charitable or other purposes, as he thinks fit, and *A.* disposes of it by will to three poor clergymen's children, in pursuance of his wife's direction; yet it is assets, and liable to *A.*'s debts. *Hinton v. Toye, M. 1739, 1 Atkyns, 465.*]

So, if *A.* by marriage settlement reserves 3000*l.* to be at his own disposal, and by will gives it to his daughter. *R. 2 Ver. 465.*

[If a man, having a power to charge his wife's estate with 2000*l.* by will, gives 500*l.* a-piece to his two sisters, yet the whole 2000*l.* shall be liable to his debts. *Bainton v. Ward, P. 1741, 2 Atkyns, 172.*]

[If a man has a power to dispose of a reversion in fee, and makes no disposition of it, yet it shall be assets to satisfy specialty creditors. *Ibid.*]

[If *A.* on marriage settles his estate on himself for life, his wife for life, remainder to preserve, &c. remainder to his first and other sons in tail male, remainder to himself in fee, and there is issue a son, and *A.* dies indebted by bond, and then the son dies without issue, having devised the estate to *B.* in fee; this reversion in fee now come into possession is assets to pay the bond debts of *A.* *Kinaffon v. Clark, T. 1741, 2 Atkyns, 204.*]

[If a man after marriage, yet in consideration of a portion paid at the time, settles lands to himself for life, his wife for life, and his son in tail, and afterwards makes a purchase jointly with his eldest son, and then another jointly with his youngest son, paying the whole purchase-money, and long after gives a judgment, and dies, leaving other lands mortgaged, the mortgaged premises shall be sold, and the money applied, first to pay the mortgage, and then the judgment, and if not sufficient, a moiety of the two joint purchases shall be sold and applied to pay the judgment, and the surplus, if any, paid to the two sons respectively. *Stileman v. Ashdown, M. 1742, 2 Atkyns, 477. T. 1743, 2 Atkyns, 608.*]

[If a man has power to charge a sum on land by deed or will, and executes it by a voluntary deed, it is personal assets, and his sons in law claiming under settlement before marriage are not entitled to the benefit of it. *Pack v. Bathurst, T. 1745, 3 Atkyns, 269.*]

[If a person has a general power to appoint to uses, it is his absolute estate, and shall be subject to his debts. *Troughton v. Troughton, H. 1747, 3 Atkyns, 656.*]

If a term for years is bequeathed, and the executor assents to the bequest, yet this term shall be assets in the hands of the legatee to satisfy the debts of the testator. *R. Ca. Ch. 257.*

Otherwise, if the legatee sells it for a valuable consideration, it shall not be assets in the hands of the purchaser; for he has a good title in law, and shall not be prejudiced by a secret trust for creditors. *Ca. Ch. 257.*

[If *A.* mortgages his estate to *B.* who gives no money for it, but a bond,

bond, and *A.* dies, and makes *B.* his executor, the bond, tho' extinguished at law, shall be assets in equity. *Fox v. Fox*, *M.* 1737, 1 *Atkyns*, 463.]

[If after a bidder for an estate under a decree is confirmed the best purchaser, he is kept out of possession some time by a mortgagee, and in that time several lives fall in, whereby the value of the estate is greatly increased, the court will order a further sum to be paid by the purchaser. *Davy v. Barber*, *M.* 1742, 2 *Atkyns*, 489.]

[Altho' testator had declared to his executors, that he never meant to call for payment of a promissory note, it was held part of the assets, which were insufficient for the legacies. *Byrn v. Godfrey*, 4 *Ves. jun.* 6.]

(2 G 2.) What not.

But if an executor takes a new bond to himself for a debt of the testator, he shall not be compelled to pay the money, but only to assign the new security to the heir. *R. Ca. Ch.* 74.

If an executor gives his recognizance to pay creditors, and houses of *London* are burnt down by fire, by which the greatest part of the assets is lost; there shall be no remedy upon the recognizance above the value of the assets which remain. 2 *Ver.* 57. *Vide Eq. Abr.* 85.

If a factor sells the goods of his principal, and afterwards lays out the money in other goods, these shall not be assets for the payment of the debts of the factor.

So, if a factor sells goods for *A.* and dies before payment, nothing but the factorage shall be assets; for the money belongs to *A.* for whom the factor was only a trustee. *R. 2 Ver.* 638.

So, if a term is granted to *B.* who re-demises it to *A.* at a pepper-corn rent during his life, and afterwards at 1500*l.* per ann. during the life of his wife for her jointure, and afterwards at a pepper-corn during the residue of the term; the term shall not be assets, being created for a special purpose, but for specialties, which charge the inheritance. *R. 2 Ver.* 58. 215.

[If *A.* having a church-lease, on renewal inserts his brother *B.*'s name with his own, *A.* paying the fine and rents, and receiving the profits, if it is proved by one witness that he intended *B.* should have the survivorship, it shall not be assets. *Maddison v. Andrew*, *M.* 1747, 1 *Vesey*, 57.]

[But if *A.* makes a voluntary settlement, reserving a power to charge it with 1000*l.*, and by his will leaves a legacy of 300*l.* to be paid by his executor, chargeable on all his real and personal estate, and the personal is insufficient, this shall be assets, tho' *A.* doth not refer to the power. *Ibid.*]

If a term is agreed upon a marriage to be renewed, and assigned to the same trusts, and *A.* renews, but does not assign the term, it shall not be assets for the debts of *A.*, but is assignable to the trusts. *R. 2 Ver.* 289.

If a reversion descends to an heir as assets after judgment against the heir, he shall not be compelled in equity to sell the reversion, till it comes into possession. *R. 2 Ver.* 134.

If *A.* sells lands, and part of the purchase-money is left in the hands of the purchaser, which *A.* afterwards appoints to be paid to *B.* and dies; this money is not assets in the hands of the executor of *A.* 3 *Ch. Rep.* 3.

[If

[If *A.* binds himself and heirs in a bond, and mortgages land for more than the value, and the heir has 200*l.* for joining in sale of the premises, the 200*l.* is not assets. *Dun v. Green*, T. 1724, 3 P. W. 9. For it was only given to buy off his obstinacy, not as a price of his equity, which was worth nothing.]

If tenant for life, remainder to his eldest son in tail, remainder to himself in fee, devises the lands for payment of his debts, and dies, and afterwards the eldest son levies a fine by which the fee and tail are consolidated; the rents due in the lifetime of the son are not assets, after his death, for the debts of the tenant for life. *R. Eq. Abr.* 140.

[If *A.* tenant in tail in remainder in his father's lifetime limits the lands on his marriage, and covenants after his father's death to suffer recovery to the same uses, with power to revoke and create new, which he afterwards does, and suffers recovery, declaring the uses to trustees for himself for life to trustees to preserve, &c. to raise portions, and to his first and other sons in tail-male, &c. these lands were never assets of *A.*, nor are liable to debts by specialty, tho' they would to such debts as are specific liens. *Brown v. Durstan*, H. 1747, 3 Atkyns, 631.]

[If tenant for life assigns rents and dividends for 21 years, in trust to pay a debt to *A.* by instalments, and if he dies before all the debt is paid, then the trustee to apply the residue of the rents and dividends due at making the assignment, and accruing due afterward, toward satisfaction for the residue of the debt: these arrears are not assets, but *A.* has a specific lien on them. *Lord Townsend v. Windham*, T. 1750, 2 Vesey, 1.]

[If part owners of a ship, *A.* being one, enter into agreement empowering *A.* to contract for building, &c. a ship for them, with covenant to bear proportional shares of expences, and *A.* dies intestate, his share shall not go into his general assets, but the other part owners has a specific lien thereon, for what they have paid or shall pay for building and equipping the ship. *Doddington v. Hallet*, T. 1753, 1 Vesey, 497.]

[But where *A.* tenant for life, remainder to *B.* in tail, by fraud procures *B.*'s authority to levy a fine, sells the land, and dies, having invested the purchase money in the funds, where it remains clearly identified: *A.* held to have been a trustee for *B.* to the amount, and that therefore he has a general charge on *A.*'s estate, but not a specific lien on the money. *Newcomb v. Burdon*, 2 Anstr. 343.]

[Bond by infant for a just debt: his mother and infant sister being entitled on the death of *A.* without issue to 4000*l.* stock for the mother for life, after her death to her children according to appointment, if no children, to the mother, after death of the son covenanted to pay that debt when either should become entitled to that stock: on marriage of the daughter the mother made an appointment of the stock in her favour, but next day the husband having notice of and approving the covenants to pay the son's debt, and reciting his and his wife's intention to secure it "as after mentioned," released all their right to that stock to the mother, and covenanted that when the wife should be 21, all their interest should be vested in the mother; and a trust was declared, that if the obligee should have a right to recover that debt, it should be paid out of that stock. Afterwards a bill being filed to set aside the settlement, as an appoint-
ment

ment by the mother for her own benefit without consideration, the parties were by agreement mutually released from the covenants in it; and the husband covenanted, that if the obligee should have a right in life of the mother to recover the debt, it should be paid out of that stock. The mother died intestate before *A.* determined that a fair assignee of the debt had no specific lien on the fund; which could be liable only by being brought back into the mother's assets, as taken out in fraud of her creditors; for which it must be said, either that there was no pretence for the compromise, or that there was fraud in providing for the debt only if suable in the mother's life, and not otherwise; but the marriage brokerage in the settlement was a sufficient ground for the compromise, and the bill did not go on the other ground, therefore the common decree for an account of assets, debts, and funeral expences, without reference to that fund, was made against the husband and wife as administrators. *Johnson v. Boyfield*, 1 *Ves. jun.* 314.]

[The debt of the son was a sufficient consideration for the covenants; and if the mother had survived *A.*, there would have been a specific lien. *Ibid.* 325.]

[If *A.* lends *B.* 500 *l.* on his note, he assuring him that his aunt had left him 4000 *l.* which *Chancery* had decreed him; but it appears that this 4000 *l.* was directed to be laid out in land, and was so decreed, the representative of *B.* was not obliged to pay it. *Trelawny v. Broth*, *P.* 1742, 2 *Atkyns*, 307.]

[Lands in Ireland are not liable, except bankers' lands for their notes. *Cox v. Bateman*, *T.* 1750, 2 *Ves.* 19.]

[Money left in a box in the house of testatrix, belonging to a club held there, not part of her estate, but is subject to the claim of the club, tho' barred by the stat. of limitations. *Antr.* 366.]

[Lease for years, assets, notwithstanding a covenant that lessee shall not alien. *Seers v. Hind*, 1 *Ves. jun.* 295.]

(2 G 3.) Bill for Discovery of Assets.

So, if there be a bill against an executor or administrator for discovery of assets, it ought to charge, that assets or goods of the testator came to his hands. *R. upon Demurrer*, *Ca. Ch.* 226. *Vide post.* (3 B 1.)

If an executor assigns part of the personal estate to another, a creditor may pursue it against the assignee. 2 *Ver.* 76.

So, tho' one executor admits assets, there shall be an account against another who does not admit them. 2 *P. W.* 145.

[Admission of assets, by executor, to one legatee, is an admission to all. *Cook v. Martyn*, *P.* 1737, 2 *Atkyns*, 2.]

[Where an executor by his answer admits assets, the plaintiff may go to a hearing on bill and answer, and will be entitled to a personal decree against the defendant for his demand. 1 *Brown.* 488.]

[But if, instead of this, the plaintiff, by consent of the defendant, obtain an order, that it should be referred to a master to take an account, and that a receiver should be appointed, and in the mean time, by the delay in the cause, and other circumstances, the estate become deficient, the executor shall not be bound by his admission of assets. *Id.* 489.]

[In such a case, the legatees who are unpaid must abate in proportion,

portion, and the executors must stand in the place of those who have already been paid, and sustain the loss on such an abatement. 1 *Brown*, 489.]

[On a bill for discovery of assets and satisfaction; if testator has given judgment for his daughter's portion, which he articulated for before marriage, that judgment shall have preference. *Ld. Townsend v. Wyndham*, T. 1750, 2 *Ves.* 1.]

[If testator has given judgment for the balance of an account stated between him and his son-in-law and executor, a few days before his death, the master shall enquire what debts, &c. and the judgment stand as a security for the balance, with preference, and executor may retain. *Ibid.*]

(2 G 4.) If the Assets are exhausted by a Debt upon Security, shall come in Aid.

If a man is indebted to the king and others, and his personal assets do not suffice for the whole, the debt to the king shall be charged upon the land whereby the personal assets may remain for the other creditors. 1 *Ver.* 455.

If there is a mortgage and debts upon specialty, and the executor pays the mortgage out of the personal assets; the other creditors shall have the advantage of the mortgage, for so much as was applied thereto out of the personal estate. *R.* 2 *Ver.* 273. 763.

So, creditors upon simple contract. *R.* 2 *Ver.* 763. *R. Eq. Ca.* 151. (2d part of 2 *Mod. Ca.*)

If a man having a statute or recognizance, takes all the personal assets, and does not resort to the land, whereby the assets fail for creditors and legatees; the land shall be charged to that amount for the other creditors and the legatees; for the land was the principal security. 2 *Ver.* 182, 3. 477.

So, if *A.* executes a judgment upon the personal assets only, and not upon the land, tho' both are charged. *Semb. per Hutchins*, 2 *Ver.* 182, 3.

So, if *A.* has a mortgage and a recognizance for performance of covenants, and executes the recognizance upon the personal estate, whereby the younger children of the mortgagor become destitute of any provision. *R.* 2 *Ver.* 309.

But if *A.* is surety for *B.* to *C.*, and a term is assigned to *A.* for his security, and afterwards *B.* dies and makes *A.* his executor, who pays *C.* out of the personal assets; the other creditors shall not have the benefit of this term. *R.* 2 *Ver.* 36.

If *A.* makes a settlement to the use of his wife for life, remainder to *B.* in tail, with a power of revocation; *B.* is the heir at law and sells to *C.*, the estate of *C.* is not liable to the creditors of *A.* 2 *Ver.* 44.

If *A.* makes a mortgage to *B.*, and then settles his estate upon his son in tail, and afterwards mortgages to *C.* who knew not of the prior mortgage, and dies, and his administrator pays off the prior mortgage; he shall not be allowed it against *C.* *R.* 2 *Ver.* 305.

If *A.* makes an express devise of an estate in mortgage, to a younger son, and afterwards computes his personal estate to be 5000*l.*, and gives legacies to his younger children to that amount, and directs that, if his personal estate falls short, there shall be a deduction in proportion, and that the surplus shall go to them in the same

same proportion; the mortgage shall be paid out of the personal estate, tho' the other legatees are thereby obliged to abate. 2 Ver.

477.

[Assets shall not be marshalled to support a legacy, which is contrary to law, as if testator devises real estate to be sold, and the money applied to charities, and directs debts and legacies to be paid out of personal, the court will not order them to be paid out of the real, and the personal to go to the charity. *Mogg v. Hodges*, M. 1750, 2 Ves. 52.]

[If A. agrees to purchase lands, and dies before he has paid the whole purchase-money, and by his will, after leaving 800*l.* to B. his sister, gives the purchased lands, and all his personal estate to C. his executor, who commits *devastavit* and dies, and the lands descend to D. his son, the vendor shall take satisfaction on the lands, that B. may be paid out of the personal assets. *Pollexfen v. Moore*, H. 1745, 3 Atkyns, 272.]

[Simple contract creditors cannot stand in the place of every specialty creditor to affect real assets, but only of such as had remedy against both real and personal assets of the debtor deceased. *Lacam v. Martins*, M. 1749, 1 Ves. 312.]

[Therefore, if a woman in her husband's lifetime levies a fine of her estate, making it subject to 2000*l.* his debt, and after his death borrows 400*l.* more, and charges the estate with it; the simple contract creditors shall come on the real estate for the 400*l.* satisfied out of the personal, but not for the 2000*l.* which was not the wife's debt. *Ibid.*]

(2 H) Assignment; What shall be a good one.

AN assignment shall be allowed in equity, which is not good at law; as, if an administrator of comisee assign a statute before it is extended. 2 Vent. 362.

What good in law, or not, *vide Assignment*.

So, a *chose in action* is assignable in equity, upon a consideration, by him who has the interest in it, and the assignee shall recover it in Chancery. Ca. Ch. 169. 2 Ver. 595. 2 P.W. (608.)

And the release afterwards of the assignor does not discharge it, unless it was made upon a consideration paid by the releasee, without notice of the assignment. Ca. Ch. 169.

So, an administrator, who has also the interest in the *chose in action*, may assign it; as, a husband who takes administration to his wife, may assign the money due for the marriage portion of his wife. R. Ca. Ch. 169.

[If A. and B. are two executors, residuary legatees, and A. for valuable consideration assigns part of his *residuum* to C., and afterwards for valuable consideration assigns his whole residuary share to B. without notice, yet as it is but a *chose in action* even to the executor, the first assignment must take place. *Tourvill v. Naish*, T. 1734, 3 P.W. 307.]

[If an executor assigns over a mortgage of his testator's to his own creditor in satisfaction of a debt due from him, it is a good alienation, and the daughters of testator's creditor under a settle-

ment cannot follow it. *Nugent v. Giffard, M. 1738, 1 Atkyns, 463.*

[If *A.* a banker having a mortgage dies, leaving a widow and five children, and appoints the widow, his eldest son *J.*, and another person, executors, and devises to them all his real and personal estate, in trust to pay debts, and the residue to be equally divided between his children; after payment there is a large residue; the mortgage is left in a master's hands in a suit; the children come of age; *J.* is appointed receiver of a great estate of *B.*, the cash of which is kept at the shop; he with the other two executors, no ways concerned in interest, assign the mortgage to the master as a security for his receivership, reciting, that the money due was the money of *J.*, and he dies indebted to the estate, the assignment shall not be set aside, and the executors of *B.* shall have the benefit of it for what is due on the receivership. *Mead v. Orrery, T. 1745, 3 Atkyns, 235.*]

[An assignment by an executor for a valuable consideration is never set aside but for fraud between the executor and assignee. *Ibid.*]

So, a husband, who has it in right of his wife, tho' it be only a possibility or a contingency. *2 P. W. (608.)*

But an assignment of a *chose in action* by an administrator, who has not any interest in it, shall not be decreed. *Semb. Ca. Ch. 169.*

[If *A.* insures a house for seven years, and his term expires before the insurance, and afterwards the house is burnt, and then he assigns the policy to *B.*, the landlord *B.* shall not recover against the insurers. *Sadlers' Company v. Hand-in-Hand Fire-Office, P. 16 G. 2. Wilf. 10.*]

So, a possibility may be assigned, or disposed of in equity; as, the remainder of a trust of a term for years may be transferred to another. *Ca. Ch. 8. 1 Ch. R. 29. Cont. 2 Ver. 563. Eq. Ca. 103. 1 P. W. 572. 6. Vide post. (4 W 21.)*

[If a man devises lands to his two daughters and their heirs, if either marry without consent, she to have only estate for life; if either die unmarried, his son *A.* or his heirs shall take it to him and his heirs, paying 500*l.* to the other daughter: *A.* in the life of both sisters conveys these lands, and all others to which he had any claim, &c. to his second son, and *A.* dies, and then one of the sisters unmarried; this is a good assignment, tho' the word *possibility* is omitted; for the word *or* shall be construed *and*, and then *A.* has a right to dispose of the possibility; and the eldest son of *A.* cannot have the lands on paying the 500*l.* *Wright v. Wright, H. 1749, 1 Ves. 409.*]

So, if land, &c. is devised for payment of portions, &c. and the surplus to the heir; he by will or deed may dispose of the surplus. *R. Ca. Ch. 211.*

So, debts may be assigned by *parol* upon a consideration. *Dat. 2 Ca. Ch. 7. 37.*

So, an assignment of a seaman's wages before they are due, tho' a *chose in action*, shall be good in equity: and there shall be a compensation for the money advanced for the assignment, before other debts of the assignor. *R. 2 Ver. 595. Semb. cont. 2 Ver. 391.*

[But now, by *st. 1 G. 2. st. 2. c. 14. s. 7.* every bargain, sale, bill of

of sale, contract and agreement whatever, of, for, or concerning any pay, wages, or allowance due or to grow due to any seaman or seamen in the service of his Majesty, for such service is declared to be void and of no effect.]

So, an assignment of a debt in *Holland*, between husband and wife, shall be allowed here, because it is good there. *Ca. Ch.* 232.

So, if *A.* assigns goods and debts to *B.* and the administrator of *A.* assigns his letters of administration to *B.*, his interests in the debts, &c. is assigned, and the administrator *de bonis non*, &c. are afterwards excluded. *Skin.* 232.

So, if after an assignment of a debt, or other *chose in action*, the assignor releases to the debtor, who has notice of the assignment; this does not hurt the assignee. *Vide Ca. Ch.* 169.

So, if a creditor gives a letter of attorney to *A.*, who receives the debt for satisfaction of a demand of his own upon good consideration; it shall be void, if he had notice of an assignment. *Ca. Ch.* 232.

But if a debtor pays to an attorney, having a letter of attorney from the creditor, without notice of an assignment; it shall be a good plea. *R. Ca. Ch.* 232.

So, an assignee shall be subject to the same equity, with regard to the thing assigned, as the assignor was. *2 Ver.* 692. 765.

[If a lessee, who has covenanted not to assign without leave for himself and executors, but not for assigns, becomes bankrupt, and the lease is assigned, the assignee is not bound by the covenant, and may assign. *Philpot v. Hoare, M.* 1741, *2 Atkyns*, 219.]

[But if the under assignee is insolvent, does not reside on the premises, nor plow and sow, refuses to shew the assignment, and lessor has accepted no rent, the court will set aside the assignment.]

If a termor grants the land to *A.* and his wife, to the use of *B.* for life, and afterwards to the heirs of his body, and for default of issue to *A.* for 800 years, nothing passes; because no estate is limited to *A.* and his wife, and the term for 800 years after the death of *B.* without issue will be void. *2 Ver.* 684.

[An assignment by the clerk of the peace to creditors, under an insolvent debtors' act, need not be sealed. *Barret v. Powell, H.* 1741, *2 Atkyns*, 242.]

[If *A.* tenant for life is discharged under an insolvent act by the compulsory clause, and not by his own claim, yet the estate in tail vests in the assignee. *Smith v. Cooke, T.* 1746, *3 Atkyns*, 378.]

[If *A.* indebted to *B.*, gives him a draft on a fund, due to him out of the *Exchequer*; this is a good assignment, and shall prevail against assignees if *A.* become bankrupt. *Ross v. Dawson, M.* 1749, *1 Ves.* 331.]

[If the obligee delivers a bond, saying, "In case I die it is yours, and then you will have something," it is a sufficient *donatio causa mortis*, and passes the equitable interest of the bond after the death. *Snellgrove v. Bailey, H.* 1744, *3 Atkyns*, 214.]

[An assignment of the half-pay of an officer in the army, is bad in equity as well as at law. *Stone v. Lidderdale, 2 Anstr.* 533.]

[A woman married *de facto* to *F.*, whom she knows to have a former wife, joins with him in an assignment of a legacy due to her

under her father's will, for the benefit of his creditors, held to be bound as a *feme-sole*. *Anstie v. Mason*, 3 *Anstr.* 833.]

[*Qu.* Whether the office of register of the court of Chancery is assignable, or whether all the profits are so. 3 *Ves. jun.* 33.]

(2 I) Average.

Chancery will enforce an average, or contribution to be made, where it is necessary. *Ca. Parl.* 19. *Vide post.* (2 S).

And therefore, if some goods are thrown overboard in a tempest for the preservation of others, the owner shall have contribution of all the goods saved by that means, whereby the loss of every one will be equal. *Mo.* 297.

So, if some goods are given to a pirate, or enemy, who had taken the ship, by way of composition, for the redemption of the rest. *Mo.* 297.

So, if merchants agree to pay an average, when goods are spoiled, &c. in cases where an average is not requisite, it shall be decreed. *R. Mo.* 297.

So, creditors and legatees, &c. ought to make contribution or abatement in proportion.

If *A.* devises his real estate to his son, and a term to his daughter, and there are bonds and other debts, but no personal assets; the son and daughter shall pay in proportion to the value of the estate or each of them. *R. 2 Ver.* 756.

[Tenant for life of an estate for the lives of others shall pay one third of the fine and charges of renewal of the lease, and the remainder-man in tail two thirds. *Verney v. Verney*, *P.* 1750, 1 *Ves.* 428.]

If an estate subject to the payment of debts is devised to *A.* for life, remainder to *B.* in fee; the tenant for life, who takes the profits, ought to discharge the interest. *R. 2 Ver.* 566.

So, a husband, who has land in right of his wife so subject. *Dub.* 2 *Ver.* 566.

So, if a portion is charged to be raised by a term upon estates in *A.* and *B.* after two lives; the estate in *A.* comes into possession, and the owner to prevent the sale of the term upon his estate pays the whole portion; he shall have contribution against the owner of the estate in *B.* *R.* 2 *Ver.* 355.

But average shall not be paid, except when some goods are lost for the salvage of the others: and therefore if some goods are damaged in the ship, the others shall not be contributory to the damage. *Ca. Parl.* 20.

So, if some of the goods are taken by violence of pirates, the others shall not be contributory. *Mo.* 297.

So, if upon apprehension of enemies some goods are conveyed to land and secured, and the rest are taken; the owner of the goods taken shall not have average of the goods saved; for the salvage of these is not the cause of the taking of the rest, neither was the taking of those the cause of the salvage of the goods which were secured. *R. Ca. Parl.* 20.

Altho' the goods saved were not more ready to be secured, but were preferred, as being of the most value. *Ca. Parl.* 20. So,

So, there shall be no average, when the other goods are not saved by that means; as, if some goods are thrown overboard for the salvage of the ship, but afterwards the ship is lost without arriving at a port. *Vide Ca. Parl.* 20.

Vide post. (2 S).

(2 K) Award.

(2 K 1.) When it shall be confirmed.

Chancery will confirm an arbitrament made pursuant to an order of the court. *Ca. Ch.* 86. *Vide Arbitrament.*

And may confirm it in part, and make it void in part. *Ca. Ch.* 40.

So, *Chancery* will enforce an award, made on submission of the parties, without an order of the court. 1 *Ch. R.* 85. 142. *R.* 2 *Ch. R.* 304. 2 *P. W.* 450.

[If an award is made a rule of *B. R.*, which court refuses to set it aside on one hand, or to grant an attachment on the other, so that one party is left to his action on the bond, this court will consider the other as left at liberty to ask relief by bill. *Ward v. Periam*, 1720, cited by *Lord Hardwicke*, in *Chicot v. Lequesne*, *T.* 1751, 2 *Ves.* 315.]

[If a submission be by rule of *B. R.*, and umpirage made thereon, and no application to that court within the time limited by statute, yet equity may take cognizance of it after the time elapsed. *Per two Barons cont. one, Alarides v. Campbell*, *P.* 1729, *Bunb.* 265.]

[If a bill is brought to set aside an award, made a rule of *B. R.* for fraud, and defendant pleads the award, but by his answer submits to amend errors, the court will order the plea to stand for answer, tho' the proper proceeding should have been in *B. R.* by shewing cause against the rule for attachment. *Kamphshire v. Young*, *H.* 1740, 2 *Atkyns*, 155.]

Tho' the award was defective, because land was awarded to *A.* where it was intended to be, to him and his heirs, as appeared by the depositions of all the surviving arbitrators. 1 *Ch. R.* 85.

Tho' the award was made by the king. 1 *Ch. R.* 138.

Tho' the award was not good, *ex rigore juris*. *R.* 2 *Ver.* 25.

[On an award made a rule of a court of law, one term being that no bill in equity shall be filed, the court of *Chancery* has a discretion to proceed or not on a bill to set it aside. *Lord Lonsdale v. Littledale*, 2 *Ves. jun.* 453.]

[Strong case to shew that parties to an award are bound by it. *Price v. Williams*, 1 *Ves. jun.* 365.]

[Exceptions will not lie to an award, but the same topics may be a ground for a motion to set it aside. *Rice v. Williams*, 3 *Bro. C. C.* 163.]

So, if an award is concerning a lease to *B.*, that the lessee should surrender, or assign it to *A.*, and for many years *A.* hath the enjoyment of it, tho' *B.* will not assign, the award shall be confirmed and an injunction granted against *B.* 3 *Ch. R.* 20.

[The court will decree the specific performance of an award to convey an estate, where the party submitting has received the money, the

the consideration for doing it. *Hall v. Hardy*, T. 1733, 3 P. W. 187.]

[If an award directs that the debts due from the parties jointly shall be paid by them in moieties, and then mentioned three such debts only, the court will not make a presumption that there are more. *Lingwood v. Eade*, M. 1742, 2 Atkyns, 501.]

[If an award directs the debts due to the parties jointly to be paid to them in moieties, it is sufficient; and tho' it recommends to them to appoint a receiver, and if they do not, requests the court to do it, it shall not be avoided; for it is not a delegation of their power, but a recommendation; and if the parties do not comply, it is superfluous. *Ibid.*]

[An award cannot be impeached for an erroneous judgment in regard to *facts*: it may allow compound interest due by contract, either express or implied from the nature of the transaction; and whether it be due or not, is a conclusion of fact, on which the judgment of the arbitrators is final. *Morgan v. Mather*, 2 Ves. jun. 15. *Vid.* also 2 Ves. jun. 24.]

[Accounts referred to the master: order of reference to arbitrators "to take an account of all dealings in the same manner, as if the same were referred to the master, and that the parties should be concluded by the award, and further directions reserved." No objection to the award, that it awards a general balance without setting forth the particular items: the decision is final; the court will not require particulars merely with a view to the costs. *Dick v. Milligan*, 2 Ves. jun. 23. 4 Bro. C. C. 117. 536. S. C.]

[Parties may elect, that accounts shall be referred to arbitrators instead of a master, and then they must proceed as the master, and make the same report. *Ibid.* 27.]

[An award pleaded is examinable both in a court of law and equity. 2 Ves. jun. 136. 4 Bro. C. C. 311.]

[If the award directs the parties to give a general release, it is good, tho' it says the form to be settled by the master, if the court pleases to give directions. *Ibid.*]

(2 K 2.) When it shall be avoided,

(2 K 2.) *If it be unreasonable.*] So, if an award made by the order of the court be unreasonable, *Chancery* will avoid it; as, if it be awarded, that a guardian shall give bond that the infant at full age shall convey. *R. Ca. Ch.* 280.

Or, if the award in any case bind an infant. *Ca. Ch.* 280.

If the award is, that tenant in tail shall not discontinue, without the assent of him in remainder, except for the jointure of his wife. 1 *Ch. R.* 143.

If it appears, that the arbitrators mistook the fact, or the law. *R.* 2 *Ver.* 705. [2 *Ves. jun.* 15.]

[If there is a palpable mistake or miscalculation, the party aggrieved may bring a bill against the other party, and not against the arbitrator. *Anon.* T. 1748, 3 Atkyns, 644.]

[It is improper to come into this court to set aside an award merely for an objection in point of form. *Lingwood v. Eade*, M. 1742, 2 Atkyns, 501.]

[This

[This court will not take greater latitude in determining awards than courts of law. *Lingwood v. Eade*, M. 1742, 2 *Atkyns*, 501.]

[If part of the evidence is not shewn to one of the arbitrators, and he swears if he had seen it he would not have made the award, it shall be set aside. *Medcalfe v. Ives*, T. 1737, 1 *Atkyns*, 63.]

But where an award does not appear to be partial or unfair, tho' it is for the profits or possession of lands, the court neither vacates or confirms it, but usually sends the parties to law. 2 *Ch. R.* 34.

So, *Chancery* admits exceptions, tho' the reference is by order of the court, with a clause that the award shall be confirmed by the court without appeal or exception. 2 *Ver.* 109.

[An exception to an award must arise on the face of it compared with the proceedings in the cause. Any thing *debors* the award must be adduced on motion grounded on affidavit. *Dick v. Milligan*, 2 *Ves. jun.* 28. 4 *Bro. C. C.* 117. S. C.]

[Award on general reference not to be impeached by exceptions, but by cross motions to set aside and confirm it. *Knox v. Symmonds*, 1 *Ves.* 369.]

[Arbitrator on general reference of all matters, &c. may go farther than the court could, to do complete justice, and may therefore relieve against a harsh right. *Ibid.*]

[A party may impeach the award for corruption or gross mistake, not simply for erroneous judgment. *Ibid.*]

In case of mistake, the arbitrator must be convinced of it, and that he acted upon it. *Ibid.*]

[But on reference to enquire into facts, he is as a master, and the court will draw the conclusion; or if he has, will see that it is right. *Ibid.*]

[Bill lies to set aside for fraud, an award made a rule of court under 9 & 10 *Will.* 3. c. 15. *Lord Lonsdale v. Littledale*, 2 *Ves. jun.* 451.]

[An award in a cause depending is not within the stat. *Ibid.*]

[If *A.*, by articles previous to marriage, agrees to vest 1000*l.* in trustees for certain uses, and then to the issue by the marriage, and gives warrant of attorney to confess judgment, which is entred up, and afterwards *A.* enters into partnership with *B.*, and being indebted to partnership estate, submits to arbitration, and award is made that part of the stock in trade shall be lodged in a third person's hands for certain purposes, and the trustees bring *scire facias* on the judgment, and take a moiety of the deposit in execution as the property of *A.*, the execution shall not be set aside. *Thompson v. Noel*, P. 1738, 1 *Atkyns*, 60.]

(2 K 3.) Or, made without assent of parties.] So, if an arbitrament is made without the assent of some of the parties, tho' his solicitor assents. *R. Ca. Ch.* 87. 1 *Ch. R.* 195.

[If one of the parties hearing that arbitrator intends to make his award, desires him to defer it till he can talk with him to support stated accounts, notwithstanding which he makes his award, the time expiring in two or three days, the court will set aside the award. *Spetigue v. Carpenter*, T. 1735, 3 *P. W.* 361.]

[Arbitrators are not bound to give notice of the time when, or place

place where they intend to meet. *Tittenfon v. Peat*, T. 1747, 3 Atkyns, 529.]

(2 K 4.) *If made only for part.*] So, if an award is made only for part of the matters referred. *R. Ca. Ch.* 87. 186.

(2 K 5.) *If it be repugnant.*] So, if an award is repugnant. *R. Ca. Ch.* 87.

Or, impossible. *R. Ca. Ch.* 87.

And therefore, the court may examine the reasons and grounds of the proceeding of the arbitrators, and what matters they considered. *R. Ca. Ch.* 186.

If there is a submission to a reference, by the order of the court, the submission is revocable. *R. Ca. Ch.* 185.

But a revocation without cause will be a contempt of the court. *Ca. Ch.* 185.

(2 K 6.) *If made by corruption or partiality.* So, if an award is made upon a private submission without an order of court, *Chancery* may avoid it, if it was made by corruption. *R. Ca. Ch.* 279.

Or, if it exceeds the authority. *Ca. Ch.* 279.

So, if an umpire, before the time of the referees is elapsed, declares he will give so much, and afterwards does give so much, which was more than was demanded by either referee, the award shall be avoided; for it induces a presumption of corruption. 2 *Ver.* 100.

[If an arbitrator makes an improper declaration, as that he will make *A.* pay costs, or that *A.*, having misused *B.*, he will mulct him in his representatives, he shall pay costs. *Ward v. Periam*, 1720, *Chicot v. Lequesne*, T. 1751, 2 *Vesey*, 315.]

[If an arbitrator promises to hear witnesses, and afterwards refuses, or omits to do it. 2 *Ver.* 251.]

If a reference is to three, or any two of them, and two, without the other, agree to make an award. 2 *Ver.* 514.

If the arbitrators admit and hear one party, and refuse the other, 2 *Ver.* 515.

So, if an arbitrator is a party who has an interest in the matter in question. 2 *Ver.* 251.

Or, is a near relation to one of the parties. 2 *Ver.* 251.

Or, if they choose an umpire by lot. 2 *Ver.* 485.

[Arbitrator ought not to consider himself as agent for the person who appoints him. 1 *Ves. jun.* 226.]

But it shall not be avoided, because it is not reasonable; for the parties have submitted to the judgment of the arbitrators. *Ca. Ch.* 279. *Semb.* 1 *Rel.* 380.

Or gives excessive damages, if no corruption or partiality is proved. *R.* 2 *Ca. Ch.* 140. 1 *Ver.* 157.

Tho' one party was not heard, if he had an opportunity, and neglected to be heard. *R. Eq. Ca.* 63.

So, it shall not be avoided, because the submission being between *A.* and *B.*, executors of *C.* of the one part, and *D.* of the other part, the award was, that *A.* having a judgment against *C.* in his lifetime, which he had extended against *D.*, the terre-tenant should acknowledge satisfaction upon the judgment, whereby *B.*, the other executor, would

would be discharged thereof as well as *D.*, for the submission warrants an arbitrament of demands between *A.* and *B.* as well as of demands which *A.* and *B.* have jointly, or severally against *D.* *Semb.* 1 *Ver.* 259. Nor, because the arbitrators referred it to others, by the assent of the parties, to make a valuation of improvements upon land. 1 *Ch. R.*

141.

And now, by the *st.* 9 & 10 *W.* 3. 15. in matters in which there is no remedy, but by personal action or suit in equity, parties may agree, that their submission to an award be made a rule of any of his majesty's courts of record, and insert such agreement in their submission, &c. which agreement so inserted shall on *affidavit* read and filed in court, be made of record, and a rule of court shall be, that the parties be concluded by such award, and if they refuse to obey it, process of contempt to a rule of court shall issue, and not be stayed by any other court of law or equity, unless it appear on oath, that the arbitrators misbehaved themselves, and such award was procured by corruption, or other undue means; but an award by corruption or undue means shall be set aside by any court of law or equity, so as complaint be made in court, where the rule was for such submission, before the last day of the next term after the award published.

And therefore, a submission to an award shall be made by a rule of a court of equity, as well as of the courts of law.

But a court of equity will enforce the performance only by attachment, which remedy fails if the defendant dies. 2 *Ver.* 444.

[Injunction being dissolved on the coming in of the answer, the parties proceeded to trial at law, but agreed to refer the matter to an arbitration by rule of court.—“Award of costs at law to defendant in equity, and that all suits in law and equity between the parties should be *discontinued*.” Motion in *Exchequer* on his behalf, that the bill might be dismissed on this award, the word *discontinued* meaning *dismissed* in equity, refused; for if plaintiff proceeds in his bill, defendant should move for an attachment in the court, which made the rule; so, if plaintiff refuse to dismiss his bill, if that be the meaning of the award. *Hutchinson v. Hodgson, Anstr.* 361.]

(2 L) Bankrupts.

(2 L 1.) When Chancery aids.

Chancery will compel every person concerned in the estate of a bankrupt to make a discovery to the assignee of the commissioners. *Vide Bankrupt.*

Tho' he was servant to the bankrupt, and had given an account to him, and was examined before the commissioners. *R. upon a plea of such matter, and the plea over-ruled.* 2 *Vent.* 358. *Semb.* 2 *Ca. Ch.*

73.

[Bill lies for assignee of a bankrupt for delivery of goods pledged by the bankrupt, notwithstanding statute of limitations, and also as he has a right to come here to know what is due, that he may make a tender. *Kemp v. Westbrook, T.* 1749, 1 *Vesey*, 278.]

But to a bill for discovery it is a good plea, that the defendant was a purchaser *bona fide* before the commission issued, without notice of any act of bankruptcy. *R.* 2 *Ca. Ch.* 73. *R. ibidem*, 135, 136. 156. *Sain.* 149.

[IF

[If bankrupt, whose estate is in mortgage, conveys the equity of redemption to a third person, after act of bankruptcy, but before commission, this shall not defeat the assignees, but mortgagee shall re-convey to them, on payment of principal and interest. *Collet v. De Golt*, H. 8 G. 2 C. T. T. 65.]

Yet if the plaintiff will enter his consent with the register, not to take advantage of the discovery at law, the defendant shall shew what goods he purchased, and for what price. 2 *Ca. Ch.* 156, 7.

And if the purchase was for a small value, the plea shall not be allowed. 2 *Ca. Ch.* 156.

So, it will be a good plea to a bill for discovery of the land of a bankrupt, that the defendant was a purchaser *bona fide* for a valuable consideration, before commission, and without notice. R. 2 *Ca. Ch.* 136.

So, *Chancery* will hear proof of a debt, if the commissioners disallow it. *Ca. Ch.* 275.

So, it will direct a distribution of a debt recovered by the assignees, to the creditors of the bankrupt, if the assignees are in fault. *Ch. R.* 264.

Or, disallow a fraudulent distribution; as, if made before the land or effects were sold. *Per two Commissioners, Rawlinson cont. Vide 2 Ver.* 162.

Or, allow persons to come in for a distribution, where they ought to have it, tho' disallowed by the commissioners. *Ch. R.* 467.

And enlarge the time for coming in for a distribution, as to the plaintiff and others, not parties to the suit, if they contribute afterwards their share of the expence of the suit. *Ch. R.* 359.

So, if there is a commission against partners, *Chancery* allows, after the joint debts are satisfied, the separate creditors of each partner, paying contribution, to have relief under the same commission, out of the separate estate of each bankrupt. R. 2 *Ver.* 293. 706.

[So, a creditor by bond of one partner, for money which came to the use of the partnership, may prove against the joint or separate fund, against the joint fund on account of the money having been applied to that fund, on the separate account of the security. 2 *Brown*, 595.]

So, upon a commission at the petition of the separate creditors of one bankrupt after their separate debts are satisfied, the joint creditors of him and the other partner shall have relief for so much as the joint stock does not satisfy. 2 *Ver.* 706.

[So, on a separate commission, where there is no joint estate, the joint creditors will be admitted to prove their debts, and to receive a dividend *pari passu*, with the separate creditors. 1 *Brown*, 454.]

So, where there are joint effects, the assignees under a separate commission shall be permitted to possess themselves of the separate bankrupt's proportion of the joint effects, and then the joint creditors admitted to prove under the separate commission. 1 *Brown*, 577. 2 *Brown*, 5.]

[And by a more recent order, joint creditors shall be admitted generally to prove their debts under a separate commission, and receive a dividend rateably with the rest of the creditors of the bankrupt. *Id.* 119, 120.]

[When partnerships have been commenced at different times, on a bankruptcy

bankruptcy of all, *Chancery* will direct separate accounts, and that each estate shall first bear its own debts, and that after full payment and satisfaction of the debts on such estates, the surplus, if any, shall be carried over and constitute part of the joint estates: the costs of the application to be paid out of the joint estates, and the expence of keeping the several distinct accounts to be paid out of each of the respective estates, according to the proportions in which the commissioners shall think proper. *1 Brown, 15, 16.*]

So, *Chancery* will aid a creditor of a bankrupt, being an assignee of stock before the bankruptcy, tho' only the day before; for there may be a reason for the preference of one creditor before another. *R. 2 P. W. 430.*

[If *A.* after secret act of bankruptcy pays money (without fraud, and before the commission) to *B.*, against whom the assignees recover it at law, *B.* shall in this court be allowed the sums he paid *A.* during the same period, notwithstanding this claim was over-ruled at the trial. *Billon v. Hyde, M. 1740, 1 Vesey, 326.*]

[If there is a decree for a receiver to collect partnership debts, and that *A.*, one of the partners, shall not dispose of any of the stock, and the morning of the decree he removes part of it, and then becomes bankrupt, and the assignees get possession of it; the court will order them to deliver it up to the receiver, and all others who have taken any effects or given notes since the decree, tho' it is not actually passed. *Skip v. Harwood, T. 1747, 3 Atkyns, 564.*]

[A bill may be brought for settling the demands of creditors, tho' the court would have had the same power on a petition, and the rule of determination must be the same on both. *Bromley v. Goodere, M. 1743, 1 Atkyns, 75.*]

[The representatives of a bankrupt are bound by the proof of the debts before the commissioners, unless objection made in a reasonable time. *Ibid.*]

[Assignees have all the equity creditors leave, and may impeach transactions, which the bankrupt could not impeach. *Anderston v. Maltby, 2 Ves. jun. 255.*]

[Act of bankruptcy, by lying two months in prison; joint and separate commissions; the former being established, and the latter superseded, the attorney employed by the bankrupt, in sustaining the latter against the former, has no lien on papers delivered to him by the bankrupt after the arrest: on petition of the joint creditors he was ordered to deliver them up. *Ex parte Lee, 2 Ves. jun. 285.*]

[Bill will lie against bankrupt, and assignees charging a fraudulent bankruptcy, and other fraudulent acts. *King v. Martin, 2 Ves. jun. 641.*]

[After judgment by default in an action for a dividend under a commission of bankruptcy, the assignees filed a bill for discovery, and to have the proof of the debt expunged: demurrer thereto allowed; the cause being by petition. *Clarke v. Capron, 2 Ves. jun. 666.*]

(2 L. 2.) When not.

But *Chancery* will not relieve creditors, who do not come before the commissioners in due time.

Tho' there was an agreement between the bankrupt and all the creditors, and upon breach of the agreement by the bankrupt, some of his

his creditors sue out the commission without the others. *R. Ca. Ch.* 19.

Yet after time elapsed, where there was a pretence that the plaintiff had a judgment executed before the bankruptcy, if the plaintiff brings the money levied to the commissioners, and pays contribution, he shall be admitted. *R. Ch. R.* 60.

So, if creditors in *London* agree with creditors in the country, that if they will relinquish goods sold to them by the bankrupt, there shall be a commission, and an equal distribution amongst them all, and afterwards execute a commission in *London*, and make a distribution without notice to them in the country. *R. Ch. R.* 326.

Chancery will not relieve, if the party is not a bankrupt at law; for that question is properly triable at law. *2 Ca. Ch.* 153.

So, *Chancery* will not aid the assignees of bankrupts against a purchaser of the bankrupt without notice of the bankruptcy. *R. 2 Ver.* 599.

[If a bankrupt's estate in mortgage becomes vested by mesne assignments in another, who, after the bankruptcy, but before the commission, gets a release of the equity of redemption from the bankrupt, he is a purchaser for a valuable consideration, and the court will not take advantage of him, nor grant a discovery against him. *Collet v. De Gols, H. 8 G. 2. C. T. T.* 65.]

[If there are mutual demands, defendant at law may set off his demand against plaintiff, under *stat. 5 G. 2. c. 30.* and need not come into equity. *Lock v. Bennet, T.* 1740, *2 Atkyns*, 49.]

[If a man has a specific lien upon the stock of a bankrupt, he shall have satisfaction first, and not be obliged to come in as a creditor. Thus a partner shall have his share before the separate creditors of the other partner can affect the stock, and this notwithstanding any agreement to dissolve the partnership, unless the conditions were performed by the bankrupt. *West v. Skip, P.* 1749, *1 Vesey*, 239.]

[The commissioners may proceed *ex parte* without order, if the other party does not attend. *Ex parte Bax, T.* 1751, *2 Vesey*, 388.]

[If commissioners certify *ex parte* that objections to their certificate were waived by objector's counsel, the exception shall be overruled. *Ibid.*]

(2 M) Baron and Feme.

(2 M 1.) Suit by them.

WHEN husband and wife shall join in a suit, and when either of them shall sue alone, *vide Baron and Feme (V, &c.)*

Regularly husband and wife ought to join in a suit.

[Bill by husband and wife, he claiming in her right, is to be considered as bill of the husband. *Pawlet v. Delaval, 2 Vesey*, 663.]

[If *feme-covert* sues with her husband for her separate estate, the court will order payment to a trustee for her. *Griffith v. Hood, T.* 1752, *2 Vesey*, 452.]

But if a *feme-covert* demands relief for a separate maintenance settled by husband, she may sue alone. *R. upon demurrer, Ca. Ch.* 35.

[No court has an original jurisdiction to give a wife separate maintenance; but it is always given incidentally, as on a *supplicavit* in

in Chancery, or a divorce *à mensâ et thoro propter sevitiam* in the ecclesiastical court. 2 *Ves. jun.* 195.]

[*Ne exeat regno* on affidavit of wife against husband, refused. *Sedwick v. Walkins*, 1 *Ves. jun.* 49. 3 *Bro. Ch. Ca.* 11. See also *Coglar v. Coglar*, 1 *Ves. jun.* 94.]

So, any one may exhibit a bill for a *feme-covert*, as *prochein amy*.

But upon her *affidavit*, that the bill was brought without her consent, it shall be dismissed. *M.* 1713, *Eq. Abr.* 72.

[A *feme-covert* may have leave to change her *prochein amy*, after progress in the cause, the new one entering into recognizance to answer costs, and abide order on hearing. *Lady Lawley v. Halpen*, *M.* 1731, *Bunb.* 310.

(2 M 2.) Suit against them.

When they shall be joined in a suit, and when not, *vide Baron and Feme* (Y).

If a *subpœna* is taken out against husband and wife, service upon the husband, with notice that it was also against his wife, is sufficient. *Vide Pract. Reg. in Chan.* 343.

And if the husband appears, but not the wife, an attachment goes against both. *Ib.*

Or, by order of the court, it may be against the wife alone, where the husband pleads in the name of himself and his wife, and swears to the plea, but his wife, by combination with the plaintiff, will not be sworn. *Ca. Ch.* 296.

[A wife shall be allowed to answer separately, if she cannot in conscience swear to the answer prepared by her husband. *Ex parte Halsam*, *T.* 1740, 2 *Atkyns*, 50.]

[If husband and wife are joint defendants, yet if it appears that they have opposite interests, the court will order the wife to answer separately. *Penne v. Peacock*, *M.* 8 G. 2. *C. T. T.* 41.]

So, if the husband is beyond the sea, and the wife within the realm, process against the wife alone, for a thing done by the wife, or in which she was a trustee, shall be regular, and she shall be allowed to give a separate answer. *R.* 2 *Ver.* 614.

[But not because her husband is a prisoner in the King's Bench. *Anon.* 2 *Ves. jun.* 332.]

[Husband, a formal party to a bill against wife, in respect of her separate estate. 1 *Ves. jun.* 278.]

[Where the wife lived in adultery with the plaintiff, the husband allowed to answer separately. *Chambers v. Bull*, 1 *Anstr.* 269.]

[If husband and wife are defendants, the wife must answer, tho' her answer cannot be read against the husband; tho' it may possibly against her when *discover*. *Wrottesly v. Bendish*, *H.* 1733, 3 *P. W.* 235.]

[If husband and wife are administrators, and live abroad, and wife coming to *England* is taken up on process of contempt against both, and gives bond for appearance, appears, and obtains time to answer separately, she cannot afterwards have the bond and appearance set aside. *Travers v. Bulkeley*, *H.* 1749, 1 *Vesey*, 383. 1 *Wilson*, 264.]

(2 M 3.) What they shall be compelled to do.

Husband and wife may be compelled to levy a fine, or to perfect an assurance.

So, to make a release of the right of the wife to land.

[If

[If *A.* settles an estate in trustees to him for life, his wife for life, and to the heirs of their bodies; they have a daughter who marries *B.* *A.* marries a second wife, and agrees to settle this estate on her and their issue. Afterwards all agree that *B.* shall have 200*l.* with his wife, and the estate go to *C.* son of the second marriage; *B.* and his wife by an answer afterwards disclaim, but she after that refuses to join with *C.* in a conveyance to a purchaser: the court will not decree her to join, but will decree *B.* to join, and to procure her to join, or that he *B.* shall refund the 200*l.* *Sedgwick v. Hargrave, M. 1750, 1 Vesey, 57.*]

To re-convey by fine lands mortgaged, vested in the wife.

To produce evidences.

To stay waste committed by the wife.

(2 M 4.) What not.

But a husband shall not be compelled to perform to his wife, after a separation, a promise made her during coverture, to give her 100*l.* 1 *Ch. R. 60.*

So, a woman shall not be compelled to perform her agreement by deed made during her coverture.

Nor, to abide by a settlement made by her and her husband; if she does not assent to it, after the coverture is determined. *Ca. Ch. 255.*

Yet if the settlement is in lieu of the performance of marriage articles, and the wife, after the death of her husband, enters and takes the profits, she shall not afterwards avoid it. *R. Ca. Ch. 255.*

[Equity will not make good against a wife, a contract on which she cannot be sued at law. *Semb. 2 Ves. jun. 156.*]

(2 M 5.) Act of the Husband; when it binds the Wife.

If the husband releases a debt due to the wife before coverture, she shall be bound by it.

So, if he releases a legacy, tho' only contingent, or there is a possibility that the wife may have it; if the contingency afterwards happens. 2 *P. W. (608.) Vide Assignment, ante (2 H).*

[But if there is a proviso in marriage articles, that if there is no issue, then the portion, and all sums given to the wife during the marriage, shall be enjoyed by the husband, his executors, &c. to their own use; and the wife's mother leaves 2000*l.* to them and the survivor, and if no issue, then after the death of the survivor to her own executor; and 1000*l.* is paid to the husband, who dies and leaves all his estate to his executor, in trust for, &c.; this 1000*l.* shall, notwithstanding, belong to the wife, as not such money as intended under the covenant. *Hawkyns v. Obyn, P. 1743, 2 Arkyns, 549.*]

If *A.* gives a legacy to a woman, and upon her marriage it is agreed that part thereof shall be applied to the payment of the debts of the husband, and after marriage the husband assigns the residue for the payment of his debts, the wife shall be bound thereby. *R. Eq. R. 80.*

So, if a husband, possessed of a term of years in right of his wife, leases for a less term, and for the security of money borrowed of his lessee, covenants to make him another lease after the end of the prior; the wife shall be bound thereby; for this covenant amounts to a disposition of the estate in equity, pursuant to the power of the husband. [If *R. Eq. Ca. 42, 3.*]

[If three sisters of an intestate agree to divide his personal estate, and sign a memorandum at the bottom of the account; and a mortgage in fee, and another for a term are allotted to *A.*, one of the sisters, whose husband, before any assignment, borrows 200*l.* of *B.* on note, deposits the two mortgages, and promises in writing to assign them as a security, and dies, this promise to assign amounts in equity to an assignment *pro tanto*, but the residue belongs to *A.* as her *chose in action*. *Bates v. Dandy*, *T.* 1741, 2 *Atkyns*, 207.]

[Husband may assign his wife's term, or trust of term, (unless from himself for her benefit,) or her mortgage in fee, or her chose in action, or her possibility for valuable consideration, or release her bond without receiving any of the money. *Ibid.*]

[If by marriage settlement of *A.*, a term is created to raise 2000*l.* a-piece for the daughters *living at his death, who shall attain 21, or be married*; and one daughter *B.* marries *C.* in *A.*'s lifetime, and previous to the marriage there is a covenant on the part of *C.*, reciting, that *B.* had assigned a bond for 500*l.* to trustees, to him for life, her for life, then to their children then living, or in default of children to the executor of the survivor of *B.* and *C.*, and that *C.* shall after the marriage assign to the trustees all money and securities then due and owing, and *belonging* to *B.*, or which she is entitled to in any respect whatever; and then *A.* dies, and then *C.* leaving children, the 2000*l.* shall be secured to them. *Bash v. Dalway*, *T.* 1747, 3 *Atkyns*, 530. 1 *Ves.* 19.]

[If husband and wife join in fine of the wife's lands to a purchaser, and afterwards the husband alone declares the uses by articles, and there is no other deed declaring uses, and these do not vary from what she intended, and she has acquiesced for many years, she is bound. *Swanton v. Raven*, *T.* 1744, 3 *Atkyns*, 105.]

So, if husband and wife by articles during coverture, agree to have lands inclosed; the wife shall be bound, tho it is part of her jointure. 2 *Ver.* 225.

So, if they agree to accept other lands in lieu of those in her jointure; if after the death of her husband she complies with any part of the articles, she shall be bound. 2 *Ver.* 225.

[So, if the wife's bond given jointly with her husband, shall bind her separate property. 1 *Brown. Ch. Rep.* 16.]

So, if a *feme-sole* agrees for the sale of land, and before it is completed, she marries, and another agreement is made with the husband and wife, which she subscribes; she shall be bound by it after the death of her husband.

[If lease for years is assigned before marriage to trustees, to make leases for benefit of husband and wife, and after marriage husband and wife make a lease, it shall be good against the widow. *Roupe v. Atkinson*, *P.* 1724, *Bunb.* 162.]

So, if husband and wife agree with a tenant of land of the wife's, that if he will surrender one part, he shall have another part for three lives; this binds the wife after the death of the husband.

So, if a woman agrees with *A.* before marriage, for a thing to be carried into execution after the death of *A.*, and then intermarries with him; it shall be decreed, and is not extinguished by the marriage. *R. Ca. Ch.* 118. *Vide Baron and Feme.*

[Copyholder having power to bar the widow's freebench by surrender,

render, any act by him for valuable consideration will bar her equity. *Brown v. Raindle, at the Rolls, 3 Vef. jun. 256.*]

(2 M 6.) When not.

But an agreement by husband and wife, for the sale of the land of the wife, does not bind the wife.

[If two sisters joint-tenants in fee marry, and the husbands make a partition between themselves, and the heirs of the wives; this agreement of the husbands, tho' attended with long possession, does not bind the inheritance of the wives. *Ireland v. Rittle, M. 1739, 1 Atkyns, 541.*]

So, if she agrees to relinquish her jointure for other recompence, and it is decreed accordingly; she not being a party to the decree, shall not be bound by that agreement.

If husband and wife by deed, without a fine, mortgage shares of the wife in the *New-River water*, the wife shall not be bound, tho' she paid interest after the death of her husband. *R. 2 P. W. 127.*

[If a *feme-covert* has an interest in real estate entailed, no agreement of remainder-men can bar the entail without a fine, nor can this court carry such agreement into execution as to a legal estate. *Trafford v. Boehm, H. 1746, 3 Atkyns, 440.*]

So, if husband and wife exhibit a bill in equity, and after the cause is at issue, examine witnesses, and then the husband dies; and her second husband exhibits with her a new bill for the same cause; they may examine the same witnesses, for the wife was not bound by the proceedings on the former bill. *2 Ver. 197.*

[Husband and wife, by indenture assigned in trust for the husband personal property bequeathed to the wife, and in possession of the administrator; the husband by will gave the residue of his real and personal estates, in trust for his wife for life, remainder over, and died: on the bill of the wife, and her second husband, the deed was delivered up to be cancelled, on their waiving all benefit under the will. *Wright v. Rutter, at the Rolls, 2 Vef. jun. 673.*]

[*Feme-covert* having a right to elect between an annuity by will to her separate use for life, charged on a devised estate, and a title paramount to part of the same estate in tail; possession taken by her husband under that title does not preclude her election; but as it was manifestly the better interest, no inquiry was directed as to which would be most for her benefit. *Wilson v. Lord John Townshend, 2 Vef. jun. 693.*]

[Specific performance decreed of articles of separation at the suit of the wife, tho' the husband offered by his answer to receive her again. *Guth v. Guth, at the Rolls, 3 Bro. C. C. 614.*]

(2 M 7.) When the Husband shall be bound by the Act of the Wife.

[The husband during the coverture is liable to all the wife's debts before coverture, (in equity as in law,) tho' he get no fortune with her. *Heard v. Stanford, H. 9 G. 2. C. T. T. 173. 3 P. W. 409.*]

[And if any part of her fortune was not recovered by the husband during the coverture, and it comes to his hands as administrator after her death, it is liable to her debts. *Ibid.*]

The husband shall be charged after the death of the wife for the debts of the wife *dum sola*, for goods to her sold, which came to the use of the husband after her death. *R. upon Demurrer, Ca. Ch. 195. Vide Eq. Abr. 60.*

So, the husband shall be charged for the profits of land in trust taken by the wife, *dum sola*, and by her former husband to whom she was executrix. *R. Ca. Ch. 81.*

So, he shall be charged for goods given to the wife for life, and after her death to *A.* if the wife wastes them; tho' the wife was then parted from her husband: for *A.* does not claim under the wife. *1 Ver. 143.*

So, a second husband shall be charged for a *devastavit* by his wife and her former husband, where there is a bond debt due; for there is an actual lien thereby. *1 Ver. 309.*

So, an executor of the husband shall be charged for the debt of the wife during a separation, and shall not charge it upon the jointure of the wife. *R. 1 Ver. 326.*

So, for the funeral of the wife, tho' she had a separate maintenance and makes an executor, who takes care of the funeral; if he hath nothing by her will. *R. Eq. Ca. 31. (2d part of 2 Mod. Ca.)*

So, if a woman before her second marriage makes a provision for the children of a former husband; it binds the second husband. *1 Ver. 408.*

So, tho' the deed is detained in the custody of the second husband or his agent, if it was public and made before the treaty of the second marriage, where the second husband did not make a settlement or compensation for it. *R. 2 P. W. 360. 609.*

So, if there is a covenant to transfer stock for the children of the first husband, which is not transferred before the second marriage. *2 P. W. 609.*

[So, where a widow before her marriage with a second husband, conveys her fortune to trustees, *to her own use*, the deed is valid against the second husband, tho' he had no notice of the settlement, if he made no treaty before marriage. *2 Brown. Ch. Rep. 345.*]

[If a widow having children, for whom there is no provision made by articles previous to her second marriage, (her intended husband party thereto,) conveys her lands, &c. to trustees, to divide among her children by the first marriage, if none by the second, or if any, then among the children by both; and after marriage husband and wife mortgage to persons having notice of the settlement; the settlement shall stand good, and not be considered as voluntary against creditors or purchasers. *Newstead v. Searles, H. 1737, 1 Atkyns, 265.*]

[If a man by will gives a third of the moiety of the residue of his personal estate to his daughter *A.* who marries *B.*, and they have issue *C.*, and while abroad assign over his third in trust for *C.* if they die before their return; *B.* dies, and before the money is reduced into possession, *A.* marries a second husband *D.* and dies, *D.* shall make provision for *C.* out of this money; and if he writes letters, saying, he is willing to settle the whole on her, and dies, these letters shall be taken as an appropriation of the whole to *C.* *Grosvenor v. Lane, P. 1741, 2 Atkyns, 180.*]

[Creditor of the wife has a right in equity against her separate property,

property, and against her husband in respect of it, but not beyond it, if notice of such separate property. *Lillia v. Airey*, 1 *Ves. jun.* 277.]

[Agreement by wife, without the knowledge of her husband, to pay additional rent out of her separate property, good. *Master v. Fuller*, 1 *Ves. jun.* 513. 4 *Bro. C. C.* 19. *S. C.*]

(2 M 8.) When not.

[The husband is not chargeable (in equity nor in law) with his wife's debts after her death, tho' he has a large fortune by her. *Heard v. Standford*, H. 9 G. 2. *C. T. T.* 173. 3 *P. W.* 409.]

The husband shall not be charged with a debt upon simple contract or beaeh of trust, by reason of a *devastavit* by the wife and her former husband. 1 *Ver.* 309.

So, if the wife before marriage makes a settlement, without the privity of the husband, for her separate use; the husband shall not be bound by it. *R.* 2 *Ver.* 17. 2 *P. W.* 359. 535.

Tho' the settlement was made upon a former marriage, with the privity of the former husband; the second husband not knowing of it, shall not be bound by it. 2 *Ver.* 17.

So, if she makes a settlement for the children of her former husband without the privity of the second, but the settlement is detained in the custody of her or her agents. 2 *P. W.* 359.

So, if the second husband has notice of the settlement, where it was subject to the control of the wife, who limits the estate to her second husband. 2 *P. W.* 534.

Yet, if the wife before the treaty for the second marriage makes a settlement of a competent part of her estate, for a provision of her children by a former husband, the second husband not having made a jointure in recompence for this estate, shall be bound thereby. 2 *P. W.* 358. 606.

So, if a woman agrees to distribute the residue of the estate of *B.* amongst others, and then marries, and by the death of *B.* seven years after the marriage, she becomes entitled to the residue; the husband is not bound to distribute, for he was not within the intent of the agreement. 1 *Ch. R.* 26.

If a woman commits a *devastavit*, and afterwards marries and dies, the husband shall not be charged beyond what he had with his wife. *R.* 2 *Ver.* 118. *Vide Baron and Feme* (2 C).

If the husband makes a separate estate for the use of the wife during their joint lives, and afterwards limits the estate to the use of the husband for life, and after his death to the heirs of the wife, till his heir pays 100 *l.* to the executor of the wife, with interest from the death of her husband, and afterwards to the wife for life; if the wife dies before the husband, the 100 *l.* shall not be paid by the husband to the executor of the wife. *R.* 2 *Ver.* 330.

[If a woman conveys her property before marriage without the privity of the intended husband, it is fraud. 2 *Ves. jun.* 194.]

[A woman pending a treaty of marriage with *A.* settled all her property to her separate use, with his approbation; a few days after *B.* by a stratagem induced her to marry him, the day after she first thought of it: *B.* had no notice of the settlement till after the marriage, when

when he procured from her a deed of revocation; that deed was set aside, as having been obtained by duress, and the settlement established. *Countess of Strathmore v. Bowes*, 1 *Ves. jun.* 22.]

[Conveyance by a woman, under any circumstances, and even the moment before marriage, good *prima facie*; bad only, if fraudulent, as if made pending the treaty without notice. *Ibid.* 28.]

(2 M 9.) Trust for a Wife, when it enures to the Husband.

If a man devises money for the purchase of an annuity in the name of the devisee, to be paid to a woman and her assigns, and she marries, and afterwards does not cohabit with her husband by reason of his poverty; the husband is the assignee of his wife, not being excluded by special words, and the annuity, from the time of the bill by him exhibited, shall be decreed to be paid to him. *R. Ca. Ch.* 194. *Vide Baron and Femé*, (E 1, &c.)

So, if a term for years is settled by a woman before marriage in trust, and she receives the money after marriage; the property is in the husband, who may dispose of it at his pleasure. *R. Hob.* 3. *in marg.* 1 *Ver.* 7. 18.

So, if a term for years is settled by the wife, before marriage, on *A.* in trust for herself, with the assent of the husband, *A.* dies, and the woman takes another husband; the trust shall be in the power of the second husband. *R. 2 Ca. Ch.* 73. *Semb. cont. Ca. Ch.* 208.

So, if the wife, with the consent of the husband before marriage, settles a term to pay the debt of the husband, and afterwards in trust for herself; the residue shall be in the power of the husband. *R. 2 Ca. Ch.* 73.

So, if a marriage settlement is agreed upon, and afterwards the husband, to avoid a sequestration, directs a term to be vested in trustees for the sole use of the wife, and covenants that it shall be in the sole power of the wife, yet takes the profits during her life; this term, tho' proved but by one witness to be made on such an occasion, shall be decreed to the husband. *R. 2 Ca. Ch.* 180.

If by agreement before marriage the wife is to be allowed to receive the rents of her estate to her separate use, and the agreement is left with *A.* who receives, and with the privity of the wife, pays the rents to the husband; *A.* shall not account for them to the wife after the death of her husband. 3 *Ch. R.* 7.

So, if the husband settles a term for years, to the use or in trust for his wife; the husband may dispose, forfeit, or bar the wife of it; for he hath the same power over a trust in right of his wife, as he hath of a term in her right. *R. 1 Rol.* 343. *l.* 25. *per Finch. Ca. Ch.* 266. 225. *R. 2 Ver.* 270. *R. Lane*, 54.

So, if a term is granted to the use of a woman, who afterwards marries; the husband may dispose thereof. *Semb. Ca. Ch.* 266.

[So, if the wife be entitled to a trust term under her father's marriage settlement, and her father give her in marriage without requiring any settlement, the husband may dispose of that trust term, and prevent any thing surviving to her. 3 *Atk.* 435.]

[If a man proposing to give a *feme-covert* money for her separate use,

use, to secure it gives her a note for so much received and promising to be accountable, it is assets for the husband after his death. *Hodges v. Beverley, H. 1724, Bunb. 188.*]

[If a *feme-covert* deposits money in a man's hands, to be kept for her separate use, it is assets of the husband after his death. *Ibid.*]

So, if a legacy is given to the wife out of a reversion, after an estate for life; and during the life, the husband assigns it to *A.* and dies; *A.* shall have it, tho' it is afterwards paid to the wife and discharged by her. *R. Eq. R. 88. Vide post. (3 A 3, 4.)*

But if a term is granted or settled by the husband for the jointure of the wife; the husband cannot dispose of it. *R. Ca. Ch. 266. R. 1 Rol. 343. l. 30. 1 Ver. 7. R. Ca. Ch. 225.*

So, it shall not be forfeited by the outlawry, or attainder of the husband. *Ca. Ch. 225.*

Or, if it is settled after marriage upon the wife, and afterwards upon their children; the husband cannot dispose of the trust for the children. *Semb. 1 Rol. 343. l. 32.*

Or, if a term is settled before marriage in trust for a woman, who afterwards marries, and the husband survives; the husband shall not have it, but the executor or administrator of the wife. *R. 4 Inst. 87. Co. Lit. 351. 1 Rol. 346. l. 5.—But said per Rolle to be R. cont. Al. 15.*

So, if land is settled after marriage for the separate maintenance of the wife, who out of the profits saves money, which she puts out at interest in the name of a trustee, and disposes thereof by her will, and dies; her husband shall not have it. *R. Ca. Ch. 118.*

[If a bond is devised to a wife, to her sole and separate use, the interest is vested in her in equity, as much as if it had been devised to trustees for her separate use. *Rolfe v. Budder, H. 1724, Bunb. 187.*]

[If personal estate is given to the separate use of a *feme-covert*, she is considered as a *feme-sole*, and may dispose of it and all the accruer upon it, if she is seventeen. *Hearle v. Greenbank, P. 1749, 3 Atkyns, 695. 1 Vef. 298.*]

[Bequest by wife of her separate property, and its produce, whether derived from her husband or from a third person, held good. *Fettiplace v. Gorges, 1 Vef. jun. 46. 3 Bro. Ch. Ca. 8. S. C.*]

[If no disposition of wife's separate property, husband succeeds as next of kin, not by marital right. *Ibid. 49.*]

[*Feme-covert* is regarded as a *feme-sole*, as far as the instrument creating her separate estate makes her proprietor; and if she pledges it pursuant to her power, the trustees must hold to the uses she appoints; but where she appointed for the benefit of her husband, an inquiry into the circumstances was directed. *Pybus v. Smith, 1 Vef. jun. 189. 3 Bro. C. C. 340. S. C.*]

[Where a wife was entitled to a share on distribution of an intestate's effects, and the husband and she were resident in *Prussia*, by the laws of which country one moiety of his effects must come to her on his death, the court ordered the money to be paid to him without requiring him to make any settlement. *Sawer v. Shute, 1 Anstr. 63.*]

[Husband is entitled to the income of his wife's equitable interest, unless he has received some fortune with her, or has misbehaved,

as by running away with a ward of the court. *Macaulay v. Philips*, 4 *Ves. jun.* 15.]

So, if a term is created by a woman seised in fee, for a special purpose, viz. in trust for her husband for life, and afterwards to the issue of that marriage, and for default thereof to herself for the residue of the term; the husband dies without issue, and the wife takes a second husband; he shall not have the term as a term in gross, but it shall go to attend the inheritance of the wife. *R. 4 Anna*, 1 *Sal.* 154. 2 *Ver.* 520.

So, if a woman lessee settles the term in *A.* in trust, &c. and afterwards marries him in the reversion and dies; the husband shall not have the trust. *Lane*, 113.

Yet, if a term is before marriage settled, with the assent of the husband, in trustees, for the sole disposition of the wife without her husband; and the wife permits the husband to receive the rents during his life, his executor shall not account for the profits. *Semb.* 2 *Ca. Ch.* 182.

[If 100*l.* *per annum* is settled in trust for a wife's pin-money, and the husband notwithstanding finds her in clothes and other necessities, it is a bar to any demand for arrears of pin-money during such time. *Fowler v. Fowler*, *P.* 1735, 3 *P. W.* 353.]

So, if a legacy is given to the wife, payment ought to be made to the husband; for it shall not be supposed to be for the separate use of the wife, tho' she lives separately from her husband. *R. 1 Ver.* 261, 2. *R. 2 Ver.* 659.

(2 M 10.) When the Husband shall be aided for the Portion of his Wife.

So, if the portion of the wife is not paid before the death of the husband, where he has settled a jointure for it, his executor shall have it, tho' the wife survives. *R. Ca. Ch.* 189.

Tho' part of the portion was out upon mortgage, which is a *chose in action*, and survives to the wife generally. *R. 2 Ver.* 502.

Tho' no agreement expresses, that the husband shall have the portion. 2 *Ver.* 502.

Tho' the husband dies without issue, and the wife also dies before the portion is paid: for by the settlement of a jointure, the husband is a purchaser of the portion. *R. Eq. R.* 71.

[Neither the husband, nor any person standing in his place, can have the wife's fortune (in *Chancery*) without making a provision. *Middlecome v. Marlow*, *H.* 1742, 2 *Atkyns*, 519.]

[A wife must in general be present in court, to consent or elect; if abroad, persons may be empowered to examine her separately, and to certify to the court, she and they signing the examination. *Parsons v. Dunne*, *M.* 1750, 2 *Ver.* 60.]

[In such a case the examination and consent shall be taken by a magistrate of the place where she resides, attested by notaries, and translated on oath. 2 *Brown. Ch. Rep.* 663.]

[And in all applications for money of the wife to be paid by consent to the husband an affidavit must be made that there is no settlement of it on the marriage. *Id. ib.*]

[But if there be any question as to the validity of the marriage of a ward

ward of the court abroad, the court will not order money out of the bank to be paid to the husband. *Roach v. Garvan*, M. 1748, 1 Ver. 157.]

And, if the husband settles a jointure suitable to the portion of his wife, which consists of *choses in action*, and an estate of inheritance, and before the securities are altered, and the inheritance settled, the husband dies; his executor shall not have those debts, or the inheritance, without a special agreement for that purpose, tho' the husband left not, otherwise, assets for his debts. R. 2 Ver. 68.

[Yet if on marriage certain agreements are made by way of settlement on the wife, and the husband dies without having recovered a bond debt given to the wife while sole, it shall go to the husband's representative, he being a purchaser, tho' the wife's fortune was of more value than what she was to have by the settlement; and so nothing moving from the husband to the wife. *Adams v. Cole*, H. 9 G. 2. C. T. T. 168.]

Yet, if the husband releases all demands or portions of his wife for such a sum, this does not bar him of an estate due to his wife as administratrix to her sister, who was dead before the release. *Ca. Ch.* 253. *Vide ante*, (2 B 2.)

[If a woman in contemplation of marriage enter into an agreement with her intended husband (without seal or stamp) by which her property is settled on the survivor for life; this gives the husband surviving an equitable estate for life. 2 *Brown. Ch. Rep.* 534.]

(2 M 11.) When the Wife shall be aided against the Act of her Husband.

If a man agrees by articles to make a marriage settlement, *Chancery* will compel him to do it. *Vide post.* (3 Z 1.)

If the wife agrees to sell her inheritance upon consideration of having part of the money to her own proper use, and the money is vested in trustees for the benefit of the wife; this money shall not be subject to the debts of the husband, tho' the wife afterwards consents that it shall. R. 2 Ver. 64, 5.

So, if the wife, having a jointure, agrees to join with her husband in a sale of it, upon his bond to settle so much other land on her jointure; the wife as to this bond shall be preferred to other creditors. R. 2 Ver. 220.

But, if the bond is to settle other lands upon the wife for life, and afterwards upon the children, where the husband by a prior settlement might have barred his issue; the children shall not be preferred to other creditors. R. 2 Ver. 221.

[If a woman before marriage conveys her estate to trustees, to pay her the profits during life, and after her death as she should by will appoint, (or for want of it to her right heirs,) and she marries, and her husband mortgages, and they both levy fine of the premises, declaring the uses to be for securing principal and interest; this shall bind the wife, tho' she insists in her answer that it was by *duress* and fraud, unless it is otherwise proved. *Penne v. Peacock*, M. 8 G. 2. C. T. T. 41.]

[If by articles previous to the marriage of A. and B., the father of B. covenants to pay A. 1000*l.*, and that his executors should pay him 500*l.* more as the residue of B.'s marriage portion; and A. cove-

nants

nants to secure by specialty 1000*l.* to *B.* if she survives; and after the father's death, *A.* being indebted, assigns the 500*l.* to *C.* and then becomes bankrupt; *C.* shall have it. *Brett v. Forcer*, *H.* 1746, 3 *Atkyns*, 403.]

[If the husband mortgages the estate of the wife, reserving to them the equity of redemption; the personal estate of the husband shall be first applied. 2 *Ver.* 604. After other debts paid. 2 *Ver.* 689.]

So, if a man agrees upon his marriage, that his wife shall dispose of goods or money by her will, a disposal by writing in the nature of a will shall be good. *Cro. Car.* 219. 376. *Vide post.* (2 *M.* 14.) *Vide Baron and Feme*, (P 3.)

And if it is found, that she made a will, the verdict shall be good, tho' strictly it is not a will. *R. Cro. Car.* 219.

So, if the wife makes a disposition, according to the power given by her husband, it shall be good, tho' the agreement or bond entered into by the husband is cancelled by the wife during the coverture. 1 *Ch. R.* 118.

So, a disposition by the wife (who has an article of her husband for the management of her own estate) of money acquired by her own industry, allowing to the husband a reasonable maintenance, shall be good. *R. Ch. R.* 57.

If interest money, saved out of the separate estate of the wife *dum sola*, is put out at interest, and a bond given for it to the husband, who declares by *parol*, that it shall go for her separate benefit; the wife shall have the disposal of it. *R.* 2 *Ver.* 748.

[If a husband deserts his wife and children, and her relations lend her stock wherewith she trades and makes a profit, and lends money on bond and note, which the borrowers make payable to the husband; all shall be considered as her separate property, and if the husband seizes her effects, the court will order them to be restored in specie, or, if disposed of, to pay the value, and the bond and note to be paid to her separate use. *Cecil v. Juxen*, *H.* 1737, 1 *Atkyns*, 278.]

[Covenant by trustees in articles of separation between husband and wife, to pay him an annuity out of her property assigned to them; he covenants not to molest her, and the annuity is declared payable only while he should leave her unmolested; by a breach of the covenant on his part, the annuity is gone for ever. *Semb.* 2 *Anstr.* 345.]

[Agreement on marriage to settle stock and other property of the wife to her use; husband having by fraud made her transfer the stock to him, was decreed to transfer the stock, and assign the rest under the direction of the master, to trustees for her use, who were to receive the dividends due, and to become due, till such transfer and assignment. *Lampert v. Lampert*, 1 *Ves.* 21.]

[Wife having a right to be exonerated out of the assets of her husband, in respect of money raised by mortgage of her estate, and received by him, barred of such right by her telling his executor, that she would not raise her claim; and whether the legacies were paid before or after such declaration, makes no difference. *Clinton v. Hooper*, 1 *Ves. jun.* 173. 3 *Bro. Ch. Ca.* 201. *S. C.*]

[Settlement of the property of a married woman, (a ward of the court,) and of all the dividends and interest accrued, directed in op-

position to an assignment by the husband for a valuable consideration; *Like v. Beresford, at the Rolls, 3 Ves. jun. 506.*]

[Husband's assignment of the wife's property will not bar her equity upon it. *Pope v. Crasshaw, 4 Bro. C. C. 326.*]

[Husband and wife levy a fine of the wife's estate, and settle the same with a power to them to revoke, and declare new uses; they afterwards join in a mortgage term to secure a sum redeemable in payment by the husband or the persons to whom the freehold should belong; the mortgage was paid off, and the term assigned to a trustee to such uses as the husband should appoint; he afterwards (without the wife) borrows a further sum and makes the term a security, and the trustee joins in the assignment; the husband by will orders his personal estate to be applied in payment of debts, except those secured on mortgaged estates; this is the husband's debt, and payable by his personal estate, not by the mortgage term. *Astley v. Earl of Tankerville, 3 Bro. C. C. 545.*]

[Interest ordered to be paid to the wife, the husband being reduced by disease to great imbecility of mind. *Bird v. Lefevre, 4 Bro. C. C. 100.*]

(2 M 12.) Provision for a Wife.

(2 M 12.) *How expounded.*] How a provision for the dower of a wife shall be assisted by a court of equity, *vide post.* (3 E 1, 2.)

When a provision by marriage articles shall be enforced, *vide post.* (3 Z 1, &c.)

If a man by his will devises lands to trustees, to pay a third part of the profits to his wife, till his son attains the age of 21 years, and the other two thirds for his debts; tho' the son and wife die (the son under that age) the third part shall be paid to the executor or administrator of the wife, till such time as the son would have attained the age of 21 years. *R. 2 Ver. 65.*

If the husband purchases a patent of a chace to himself and his wife, and *B.* dies indebted, the wife shall have the benefit of it for her life; for she cannot be a trustee for her husband, and therefore it shall be intended for her benefit; tho' *B.* shall be a trustee for the executor. *R. 2 Ver. 67.*

So, if the husband takes a mortgage, bond, &c. in the names of himself and his wife; they shall go to the wife if she survives, and there are assets sufficient for his debts. *R. 2 Ver. 683.*

[If *A.* devises 2000*l.* stock to *B.* by her maiden name, not knowing her to be married, and the husband and wife agree to settle this 2000*l.* in trustees, in trust for the husband and wife, and the survivor, and transfer to trustees, and a declaration of trust is prepared and sent to husband, who objects to it as not according to the agreement, and directs another according to it, which is drawn, but before executed husband dies, and wife administers; she shall have the 2000*l.* in her own right, and not as administratrix. *Fert v. Fert, H. 9 G. 2. C. T. T. 171.*]

[If a husband voluntarily after marriage allows his wife the profit of butter, poultry, and the like, out of which she saves 100*l.*, which he borrows, and dies; the court will allow this as a debt, and she shall

shall come in as a creditor for 100 *l.*, especially if there is no defect of assets. *Spanning v. Style*, *M.* 1734, 3 *P. W.* 334.]

[Or, if he allowed her two guineas on the renewal of every lease, *Calmady v. Calmady*, 3 *P. W.* 339.]

[If husband does not pay his wife her full pin-money, and on her complaining thereof, tells her she shall have it last, and dies; she shall be let in to have the arrears of her pin-money. *Ridout v. Lewis*, *H.* 1738, 1 *Atkyns*, 269.]

[If *A.* before marriage conveys land to trustees, to secure 100 *l.* to his wife for her separate use, and after many years, on disputes, she leaves him and goes abroad, but without suspicion of incontinency, and is excommunicated for non-appearance to a suit for restitution of conjugal rights, instituted after ejectment brought by the trustees for arrears of annuity; the court will not relieve against payment of it, tho' the husband offers to receive her, and she will not return; especially if *A.* has paid her some part of the annuity since her elopement. *Moore v. Moore*, *H.* 1737, 1 *Atkyns*, 272.]

[If husband, by articles previous to a second marriage, agrees that one-third of his estate shall after his death go to his wife, and one-third to his children by that and the former marriage, and afterwards transfers stock to his wife for her own use, and makes his will, directing that after his marriage contract fulfilled, his effects should be divided between his wife and two daughters; the transfer of stock shall not affect the gross estate of testator, the whole of which was to be divided in such proportions by the marriage articles, which he could not alter; yet it is good against the testator, and shall be answered against his testamentary share; for gifts between husband and wife will be supported in equity, tho' the law does not allow the property to pass. *Lucas v. Lucas*, *T.* 1738, 1 *Atkyns*, 270.]

[If father and son are parties to marriage contract, and there is a deficiency in the lands settled for jointure, the wife has a lien on the estates both of father and son. *Probert v. Morgan*, *P.* 1739, 1 *Atkyns*, 440.]

[If by articles previous to marriage it is agreed, that every thing which should come to the wife should go to them for their lives, and after the death of survivor to the heirs of the body of the wife by the husband begotten; the money vests in her only, and not in him. *Green v. Ekins*, *M.* 1742, 2 *Atkyns*, 473.]

[If *A.* having an annuity for life of 50 *l.* issuing out of lands, marries *B.*, and on separating, *B.* covenants to allow 14 *l.* per ann. out of his own estate, and 24 *l.* out of the annuity, and 12 *l.* for his daughter by *A.*, and then *B.* assigns all his estate (including the annuity) to *C.* a creditor since the deed of separation; the trusts shall be decreed as against *B.*, and on *A.*'s paying *C.* the remainder of his debt, he shall assign the annuity to the trustee in the deed of separation. *Fitzer v. Fitzer*, *H.* 1742, 2 *Atkyns*, 511.]

[If *A.* an infant, entitled to a leasehold, and to 500 *l.* residue of her father's estate, marries *B.* who by deed after marriage agrees with the father's executors that the 500 *l.* shall be settled to *A.*'s separate use for life, and then to the issue of the marriage, with power to trustees to lend the money to *B.* which they do, and *B.* becomes bankrupt; the trustee shall come in as creditor for the money paid after

after execution of the deed. *Middlecome v. Marlow*, H. 1742, 2 Atkyns, 519.]

[If a husband obliged to do a particular thing for his wife's benefit, does a thing equally beneficial, it shall be presumed a satisfaction: as, long annuities are settled to husband for life, wife for life, then all the children equally, with proviso that husband, wife, and trustees, may sell them absolutely; husband alone sells, and afterwards settles stock of greater value to himself for life, wife for life, eldest son for life, his wife for life, and to the children: this is a satisfaction for the long annuities. *Weyland v. Weyland*, P. 1742, 2 Atkyns, 632.]

[If husband receives a considerable fortune by his wife, and never makes provision for her, and 500*l.* is left her for which she brings bill, and it is referred to the master to receive proposals from him for a provision which he never lays before the master, and the executor by order pays the money, which is laid out in stock for the benefit of husband and wife, subject to further directions, and husband dies, the principal and dividends shall be paid to the wife; had this been the whole fortune, the husband should have had the dividends. *Bond v. Simmons*, M. 1743, 3 Atkyns, 20.]

[If husband has received great part of wife's fortune, and will not make settlement, the court will prevent his receiving the residue, and even the interest which shall accumulate for her benefit, unless he is starving. *Ibid.*]

[Settlement on marriage of the wife's stock in trust for the husband for life after the wife's death, if he should survive her; if no issue, the whole to revert in her with power of appointment, and in default thereof to her next of kin: the wife eloped, and lived in adultery. On bill by the husband to have the dividends paid to him during their joint lives, decreed that the costs, and also the expences of the husband in a groundless suit instituted against him by the wife in the ecclesiastical court, should be paid out of the accumulation; and that the future dividends should be paid into court. *Ball v. Montgomery*, 2 Ves. jun. 191.]

[No omission in the settlements not expressing whether the dividends should go to the husband during coverture, for they would do so by law; and evidence of such intent, or that they should be to the separate use of the wife, refused. *Ibid.*]

[Assignees of a bankrupt must make a provision for his wife out of all her property, which can be obtained in equity only; and a settlement before marriage of part of her property to her separate use does not exclude her from such benefit. *Burdon v. Dean*, 2 Ves. jun. 607.]

[The equity of a wife to have a provision out of her trust property claimed by the husband attaches on newly-acquired property. 1 Ves. jun. 608.]

[Devise to the use of *A.* and her issue in strict settlement, subject to a trust for debts and legacies, and to pay annuities out of rents and profits with power to sell: on bill by creditors and legatees, one of the annuitants being living, the assignees of *A.*'s husband, a bankrupt, defendants were decreed to make proposals for a provision for her. *Oswell v. Probert*, 2 Ves. jun. 680.]

[Assignees of bankrupt, taking his wife's fortune out of the court, must make a provision for her. They consented to give her half.

Brown

Brown v. Clark, at the Rolls, 3 *Ves. jun.* 166. *Freeman v. Paisley*, *ibid.* 421. See also *Pringle v. Hodgson*, 3 *Ves. jun.* 617. *Pryor v. Hill*, 4 *Brown. Ch. Ca.* 139.]

[Husband under a decree to propose a settlement of stock belonging to his wife, transferred to the accountant-general by order, came to an agreement with her out of court, and while they lived apart, but not legally separated, to take part, and give up the rest; the husband dying before any steps were taken for executing it, the whole held to survive to the wife. *Macaulay v. Philips*, at the Rolls, 4 *Ves. jun.* 15.]

[By the common law, the wife can have no property during the coverture, but all her estate is vested in the husband: but courts of equity have for ages past thought the rules of the common law too hard, and have thought it right to protect the property of the wife from the extravagance of the husband in cases clear of fraud. This is done by the intervention of trustees; and thus far the wife is to all intents and purposes a single woman: and whenever the trust can be supported in equity, the court of *B. R.* will consider the trustee entitled at law. Fraud infects every transaction; but more especially between such near relations as man and wife; therefore it is, that a conveyance after marriage is totally void as against creditors, for then there is no consideration. By Lord Mansfield Ch. J. 3 *Term Rep.* 620. in *not. Haslington v. Gill*. See also *Cowper*, 432. 3 *Term Rep. B. R.* 618.]

[If an estate is given to a husband for the *liveliness* of his wife, he shall be considered as trustee for her separate use. *Darley v. Darley*, *M.* 1746, 3 *Atkyns*, 399.]

If *A.* on his marriage with *B.* settles an estate, which he has no right to settle, on her in jointure, and *A.* also covenants to leave her a house worth 3000 *l.*, or that his heirs, executors, &c. should pay her interest of 3000 *l.*, and there is also a term for paying her 150 *l.* *per annum* on failure of performance, and her portion is applied to discharge incumbrances which are assigned to her; after *A.*'s death, and not leaving the house, *C.* the reversioner, on confirming *B.*'s jointure and the covenant, shall have the incumbrances assigned to him, and be indemnified out of the personal estate against the 150 *l.* *per annum.* *Lord Portsmouth v. Lady Suffolk*, *T.* 1747, 1 *Vesey*, 30.]

[As in the case of pin-money, so if a wife suffers her husband (one of the trustees) to receive the rents of her separate estate, she can come in as a creditor only for one year's arrears. *Lord Townshend v. Windham*, *T.* 1750, 2 *Vesey*, 1.]

[If husband, on receipt of his wife's separate estate, buys jewels, and gives them to her, it is like paying her the money of her separate estate, and she may retain them, tho' not as *paraphernalia.* *Ibid.*]

[The jewels of the wife, tho' given by the husband's will to her for life, shall not be sold for payment of the husband's debts charged on a real estate, in aid of personalty. 1 *Brown. Ch. Rep.* 576.]

[If a man has power to make a jointure of a *clear* yearly value, the value is to be computed at the time the jointure is made, and not during the continuance. *E. Tyrconnel v. D. Ancaffer*, *T.* 1754, 2 *Ves.* 499.]

[Clear yearly value means clear of taxes borne by tenants, according to the usage of the country where the lands lie, but subject to land tax, and those borne by landlords. *Ibid.*]

[A *feme.*

[A *feme-covert* is entitled under a will to the interest of money for her life, with a power of appointment as to the principal; the executors for her *support* pay her part of the principal; she dies, having appointed to her husband; he cannot claim such part of the principal from the executors, it having been paid for her maintenance, and therefore he had the benefit of it. *Randal v. Hearle, Anstr.* 363.]

[Money vested in trustees in trust for husband and wife successively for life, remainder to the children, and in default thereof to such person as the wife should by deed or will appoint: the money ordered to be paid into court, and on taking the consent of the wife in court, her deed conveying this contingent interest was established. *Guise v. Small, 1 Anstr.* 277.]

(2 M 13.) *When barred.*] But if the husband secures 300*l.* for his wife, if she survives him, by bond and judgment, and afterwards the husband and wife join in a fine of the lands of the husband and cancel the bond, and the purchaser reserves 200*l.* to secure himself against an annuity charged upon the estate, and gives a mortgage to a creditor of the husband to pay him the 200*l.* after the annuity ceases; the wife, tho' she survives, shall be barred of the 300*l.* against the purchaser and the mortgagee. *R. Eq. R.* 19.

(2 M 14.) Disposition by a Wife.

If there is a provision that the wife by her will shall dispose; a writing, in the nature of a will, is sufficient to dispose, tho' she cannot make a will. *Cro. Car.* 219. 376. *Vide ante*, (2 M 11.)

[But where it was part of the agreement made before marriage, that the wife should have power to dispose of her property by will, it was held that a will made previous to the marriage, tho' subsequent to the agreement, was revoked by the marriage. 2 *Brown. Ch. Rep.* 534.]

[If *feme-covert* has a power to dispose by writing purporting to be a will, yet proving it in the spiritual court will not give it the authority of a will, it is only an instrument or appointment in pursuance of a power, and before it is proved in the commons as a testamentary conveyance, the husband should be examined as to his consent. *Henley v. Philips, T.* 1740, 2 *Atkyns*, 48.]

So, if she has a power to dispose in the lifetime of her husband, tho' it is not said, that she may do it by such writing. 2 *Ver.* 329.

If she has power to dispose by writing under her hand and seal, a disposition by will signed and sealed by her shall be good. *R. Cro. Car.* 376.

[If there is a power to husband and wife, and the survivor, over a reversionary interest after their deaths, by writing under hand and seal before two witnesses, and husband dies, wife marries again, and during coverture appoints by will so executed, it is good. *Burnet v. Mann, M.* 1748, 1 *Ves.* 156.]

If upon marriage a power is reserved to the wife to dispose of her personal estate, she may also dispose of all the profits thereof. 2 *Ver.* 535.

So, all her personal estate shall be presumed to be the produce of her

her separate estate, if it does not appear to have come to her by other means. *R. 2 Ver. 535.*

So, if after marriage the husband gives a note, that his wife shall have such money at her disposal; the principal and interest shall be her separate estate. *2 Ver. 659.*

[A mere voluntary promise from a husband to a wife, and executor only, is never established by this court, therefore, if husband gives a note or certificate to his wife, declaring she may dispose of 200*l.* as she thinks proper, she cannot dispose of them after his death by will. *Darley v. Darley, M. 1746, 3 Atkyns, 399.*]

[If money is settled to be laid out in lands, and a term created to raise 4000*l.* to be paid according to the wife's appointment, and there happens a loss on the funds in which the money is vested, it falls on the residue, and no part of it on the 4000*l.* *Oke v. Heath, M. 1748, 1 Ves. 135.*]

[Money devised to be laid out in land for *feme-covert* in tail, with reversion to her in fee; she having been examined on commission apart from her husband, chooses to have it paid to him: not paid without an affidavit by both, that there is no settlement. *Binford v. Barwen, 1 Ves. jun. 512. 2 Ves. jun. 38.*]

[If on marriage an estate is settled in trustees, to receive rents and profits for wife's separate use, and as she shall direct, and she sells it without trustees' knowledge, and husband covenants that it is free from incumbrances, and there is no proof of husband's using influence, tho' he received the money, the purchase is good; but the purchaser must rely on husband's covenant solely against incumbrances. *Grigby v. Cox, T. 1750, 1 Ves. 517.*]

[*Feme-covert* can dispose of her real estate only by fine, or by having conveyed to trustees before marriage, in trust, for such person as she shall appoint, or by way of power over an use, as if she conveys to use of herself for life, remainder to use of such person as she shall appoint; but not by bare agreement with the husband, tho' that may bar tenancy by the curtesy, unless the agreement be such, that she may afterwards apply to equity to compel the husband to carry it into execution, and then *qu.* Whether her heir at law is bound? *Peacock v. Monk, H. 1750, 2 Ves. 190.*]

[If a father creates a trust of real estate, the rents to be paid to his daughters, sole or covert, for their separate use, to their own hands, or as they appoint, and they join in bond with their husbands; the trustees shall pay the rents to the obligees. *Stanford v. Marshal, M. 1740, 2 Atkyns, 68.*]

[If *feme-covert*, having separate estate, doth with her husband and her trustee call it in, discharge the trustee, and it is placed out in the husband's name, and interest is received by him, and on his death she manages it as his executrix; she is barred from claiming it as her separate estate. *Parolet v. Delaval, T. 1755, 2 Ves. 663.*]

[It is not determined that a wife may not dispose of her separate property without the intervention of trustees, or to her husband without trustees, or her judicial consent in court. *Ibid.*]

[She may do it by act *in pais*, where no menace or imposition. *Ibid.*]

[She may pledge it as a security of husband's debt, and then husband shall exonerate. *Ibid.*]

[If

[If a *feme-covert* assigns her separate property in the hands of trustees, the assignee may come for execution of the trust, for her disposition is valid to the extent of her power; but a general creditor has no lien in equity on that property. *2 Vef. jun. 150.*]

[*A.* by will directed money to be laid out in manors, lands, tenements, tithes, and hereditaments; or *very long terms*, with limitations applicable to real estates: one of the devisees was a married woman, and executed a deed of appointment of her share of the money, which, on account of her option to consider it as personalty, was held effectual against her heir at law, without her having been examined. *Walker v. Denne, 2 Vef. jun. 170.*]

[Trust in a deed of separation to permit *A.* to receive the dividends of stock for the maintenance and support of the wife, with a covenant of indemnity to her husband, a grant by her of an annuity out of the dividends was held void. *Hyde v. Price, at the Rolls, 3 Vef. jun. 437.*]

[Husband and wife living separate under a divorce *à mensâ et thoro* obtained against the wife for adultery, she petitioned that a sum of money belonging to her might be settled to her separate use; he petitioned that it might be paid to him; the court refused to make any order. *Carr v. Eastbrooke, 4 Vef. jun. 146.*]

[Surrender supplied for a wife against a distant heir not provided for by the testator, tho' provided for *aliunde*. *Chapman v. Gibson, at the Rolls, 3 Bro. C. C. 229.*]

[Money invested in trust for a married woman, to pay her the interest for life, to her separate use, and after her decease, to such person and subject to such powers, &c. as she should by any instrument in writing from time to time, or by will appoint, (during her present coverture,) she cannot dispose of the principal at once by deed, but by a revocable act only. *Socket v. Wray, at the Rolls, 4 Bro. C. C. 483.*]

[Money ordered to be paid to the husband in right of the wife, a vested interest in him. *Heygate v. Annesley, 3 Bro. C. C. 362.*]

[Where a married woman will consent to have part of her fortune in court paid to her husband, the order must be made. *Dimmock v. Atkinson, 3 Bro. C. C. 195.*]

[Wife's legacy not to be paid to the husband without her consent taken before commissioners, she being abroad. *Bourdillon v. Adair, 3 Bro. C. C. 237.*]

[Husband and wife agree, that the property settled to her separate use shall be paid to the husband; the agreement shall be carried into execution by decree of this court. *Ellis v. Atkinson, 3 Bro. C. C. 563.*]

[*Feme-covert* by deed directed her trustees to pay, apply, and dispose of the rents, issues, and profits of her separate property, during her life, to her husband for his own proper use and benefit: the intention being only to give him the administration during coverture, without account, the widow held to be entitled after his death to the future rents, and to those accrued in his lifetime, and not received: if the interest had passed, the transaction under the circumstances must have been set aside. *Milnes v. Buse, 2 Vef. jun. 488.*]

[The rule that a *feme-covert* is to be considered as a *feme-sole* in respect to her separate property, does not extend to transactions with her husband. *Milnes v. Buse, 2 Vef. jun. 498.*]

[A deed

[A deed between husband and wife on her separate estate shall not be established without her presence in court, where the trustees put the parties to file a bill. *2 Ves. jun. 500.*]

[The court cannot take the consent of the wife in regard to the disposition of her fortune, unless the amount be ascertained. *Edmonds v. Townshend, 1 Anstr. 93.*]

(2 M 15.) *When the husband is in exile.*] So, the wife, where the husband is in exile, may act in all respects as a *feme-sole*: and therefore may make a will, and dispose of her land; tho' by the *st. 34 H. 8.* a devise of a *feme-covert* is void. *Eq. Abr. 171. 2 Ver. 104.*

(2 M 16.) When the Covenant of an Husband and Wife shall be enforced, tho' void.

If the husband gives a bond or covenant to his intended wife, to make a settlement upon her, tho' the bond is avoided by the marriage, it shall be evidence of an agreement, and the husband shall be compelled to make a settlement. *R. 2 P. W. 243.*

So, if the wife covenants, being an infant, to settle her estate, she shall be compelled to do it, if the husband makes a suitable settlement. *2 P. W. 244.*

(2 N) Charitable Uses.

(2 N 1.) Relief by Original Bill.

Chancery will relieve by original bill upon a gift to charitable uses within the *st. 43 El. 4.* *R. Ca. Ch. 135. 267. Dub. Ca. Ch. 158. Vide ante, (Y 6.)*

[The court will not make a decree for establishing a charity, which is properly regulated by charter from the crown. *Attorney-General v. Smart, H. 1747, 1 Ves. 72.*]

[A school founded by charter must be regulated according to the charter, not in this court, as where no charter. *Attorney-General v. Middleton, T. 1751, 2 Ves. 327.*]

[The statutes of a private foundation under a charter are not executed in this court. *Ibid.*]

[The jurisdiction of this court does not extend to charity-schools where local visitors are appointed; if it is a private visitor, he and his heirs have a right. *Attorney-General v. Price, T. 1744, 3 Atkyns, 108.*]

[If there is a public endowment by the crown, then a commission may issue from this court to inspect the charity, and the application of the money; but if by letters patent, or act of parliament, a local visitor is appointed, this court cannot interpose. *Ibid.*]

[Foundling Hospital being regulated by governors under a charter, confirmed by act of parliament: motion for an injunction to restrain them from building round it refused, no breach of trust having been shewn, either by positive or probable evidence. *Attorney-General v. the Governors of the Foundling Hospital, 2 Ves. jun. 42. 4 Bro. C. C. 165. S. C.*]

[To convert meadow land into buildings is not in the nature of waste, unless clearly injurious. *Ibid.*]

[This

[This court has no jurisdiction over governors of a charity established by charter, unless they have also the management of the revenues, of which they are then considered as trustees. *Attorney-General v. the Governors of the Foundling Hospital*, 2 *Ves. jun.* 42. 4 *Bro. C. C.* 165. *S. C.*]

[On information, administration of a charity under an appointment by the trustees, and a plan confirmed by decree, taken from the parties appointed, being subjects of the United States of America, and therefore not now liable to the control of the court. Interest under a power of appointing the application of a charity not sufficient to sustain a bill. *Attorney-General v. the City of London*, 1 *Ves. jun.* 243. 3 *Bro. Ch. Ca.* 171. *S. C.*]

[On information for a charity, relator appearing to have no title, there can be no decree but to dismiss the information, and in that case costs cannot be given out of the charity. *Attorney-General v. Oglender*, 1 *Ves. jun.* 246.]

[Yet the chancellor, in relation to *Berkhamstead* school, founded by act of parliament, with a local visitor, (the warden of *All Souls*.) did make a decree for taking an account for letting leases, and proposed augmenting the salaries of the visitor, the schoolmaster, and the usher. *Ibid.*]

[Where the governors of an hospital are visitors also, they are accountable to this court *quoad* the estates, but not *quoad* the government of the house. *Attorney-General v. Lock*, *T.* 1744, 3 *Atkyns*, 164.]

[If trustees have a discretionary power to repair road *A.* till it is good, and then road *B.*, the court will not interpose, unless they act corruptly; yet will not dismiss the information. *Attorney-General v. Harrow School*, *T.* 1754, 2 *Vesey*, 551.]

What are charitable uses, and how regulated by commissioners, *vide Uses*, (N 1, &c.)

So, by a bill by the attorney-general by way of information, it will settle or direct the disposition of a real or personal estate to charitable uses. *Ca. Parl.* 22. *Ch. R.* 259. 'Tho' the king is patron. *Skin.* 645.

And oblige trustees to act or assign their trust. *Ca. Parl.* 22. *Vide post.* (4 W 6.)

[On an information by the attorney-general, the court will give proper directions as to the charity, without regard to the impropriety of the prayer of the information. *Attorney-General v. Jeanes*, *H.* 1727, 1 *Atkyns*, 355. *Attorney-General v. Brereton*, *T.* 1752, 2 *Ves.* 425.]

[Where there is no charter, the information shall not be dismissed, because the relief prayed is improper; but there shall be a decree for the establishment: otherwise, if there is a charter. *Attorney-General v. Middleton*, *T.* 1751, 2 *Vesey*, 327.]

[Any person, tho' the most remote, in the contemplation of a charity, may be a relator. *Attorney-General v. Bucknall*, *T.* 1742, 2 *Atkyns*, 328.]

And a charitable use, as well as a purchaser, shall be relieved against a voluntary conveyance.

So, against a lessee, who made originally a mortgage, but afterwards discharged and assigned it for securing a purchaser of other tenements in the lease from incumbrances. *R.* 1 *Ch. R.* 20, 21.

And

And to such a bill all the terre-tenants need not be parties. *R. 1 Sal. 163.*

So, a decree by the commissioners may be confirmed by original bill. *R. Ca. Ch. 193.*

[Notwithstanding a decree under a commission of charitable uses, the court may permit a suit here, in which neither side is bound by what appeared before the commissioners, but may set forth new matter. *Burford v. Lentball, P. 1743, 2 Atkyns, 551.*]

So, if one terre-tenant is charged with a charitable use, he may make all the others contributory. *1 Sal. 163. 1 Ch. R. 92.*

But, if the gift is not for a charity within the *st. 43 Eliz.* the bill shall not be in the name of the attorney-general. *2 Ver. 387.*

[Augmentations of vicarages are charities, and therefore an information in the name of attorney-general, may be brought to establish a curate's right to a perpetual curacy augmented. *Attorney-General v. Brereton, T. 1752, 2 Vesey, 425.*]

[So, if there is an appeal from a decree of the commissioners, it may be heard as well by the *Master of the Rolls* as by the *Chancellor*. *Dab. Pr. Ch. 111.*]

(2 N 2.) Tho' the Gift be void by Law.

And a gift to charitable uses shall be decreed, tho' it is void in law; as, a devise of tithes impropriate to the curate of such a parish, and afterwards to all those who shall have the cure there; tho' the curate is not a corporation it is good, and the heir of the devisor shall be seised in trust for him. *R. 2 Vent. 349. Vide in Uses, (N 11.)*

So, a devise of *10 l. per ann. quamdiu* a sermon shall be at *A.* shall be decreed, tho' it is not said to whom it shall be paid, and tho' no sermon was there; for the words are tantamount to *may be, &c.* *R. 2 Ca. Ch. 18.*

So, if a rectory impropriate is devised for the maintenance of a minister, without saying to whom, it shall be decreed to a clerk to be instituted by the ordinary. *R. 2 Ca. Ch. 19. 31.*

If a copyhold is devised, and there is no surrender to the use of the will, it shall pass. *Ca. Ch. R. 75. Vide Eq. R. 5, 6. Vide Pr. Ch. 271. Vide Uses, (N 11.)*

[If copyhold not surrendred is devised to a charitable use by a will without witnesses, it is good as a direction to the heir at law to surrender, copyholds not being within the statute of frauds; it is also good as an appointment under *43 Eliz. c. 4.* and a surrender is not wanted, as a devise of lands entailed is good without a recovery. *Attorney-General v. Andrews, H. 1748, 1 Vesey, 225.*]

If a devise or settlement to a charitable use, is made by tenant in tail without fine or recovery; it shall be good against his issue and him in the remainder. *R. Pr. Ch. 16.*

So, a gift to charitable uses, shall be decreed, tho' made before the *st. 43 E. 4.* and then void in law; for that statute hath a retrospect. *R. Ca. Ch. 195.*

But Chancery will not aid a charitable use, where the will is void for want of three witnesses, &c. according to the *st. 29 Car. 2. Eq. R. 5. Pr. Ch. 272. 390.*

[Testator declaring his debts should come out of his real estate, not his personal, gave the real to trustees, charged with some charitable legacies,

legacies, and one to each trustee : by codicil he removed one trustee, and revoked his legacy, appointing another with the same legacy. He also revoked all the charitable legacies, and gave a less legacy to one of the charities named before, and other new charitable legacies, without specifying any fund. All held to be charged on the real, and therefore void as to the charitable legacies. *Leacroft v. Maynard*, 1 *Ves. jun.* 279. 3 *Bro. Ch. Ca.* 233. *S. C.*]

(2 N 3.) Where the Land, &c. given is improved.

So, if lands are given to charitable uses, and afterwards by improvement, &c. they are of greater value, *Chancery* will make application of the improvement to the same uses. *Vide* 2 *Ca. Ch.* 53. *Pr. Ch.* 225.

If a devise is of 10*l.* *per ann.* *quandiu* a sermon shall be at *A.*, and no sermon was for many years there, the arrears shall be applied for the purchase of other land for the increase of the salary. 2 *Ca. Ch.* 18.

If a man say, that having determined his manor for charitable uses, he devises it, which was of the rent of 240*l.* *per ann.* to trustees, upon trust to pay such sums annually, which amount to 120*l.* *per ann.* to such charities; the surplus also shall be decreed to charitable uses. *R. Ca. Parl.* 23.

So, if lands given to charitable uses are in lease and improved, the lessees shall be decreed to make an increase of the rent; for they ought not to gain, if they do not lose, by the charity. *R. Ca. Ch.* 195.

So, if lands then in lease for 70*l.* *per ann.* are purchased by a corporation, but the greater part of the purchase-money given by the charity of private persons, and afterwards the lands are improved to a greater value; tho' 70*l.* *per ann.* only was allotted for charities, and the surplus always applied to the use of the corporation, yet the surplus shall go for the augmentation of the same charities. *Cont. in Chancery, but reversed in Parliament*, 2 *Ver.* 397.

[Lands are settled to charitable uses by one instrument, and by another executed the next day part of the rents is appropriated to the charity in a mode therein specified, and power given to the founder to make leases, reserving rent to the amount of such part; on the expiration of the leases so granted by him, the whole surplus results to the charity under the general trust, and not to the heir. *Attorney-General v. Tonner*, 2 *Ves. jun.* 1. 4 *Bro. C. C.* 178. *S. C.*]

(2 N 4.) How Charitable Uses shall be decreed.

(2 N 4.) *According to the intent of the donor.*] *Chancery* will decree the charity generally as near as can be to the intent of the donor; and therefore, if the gift is of money to the parish of *B.* generally, it shall be decreed to the poor. *R. Ca. Ch.* 135. *Vide Uses*, (N 22.)

If the gift is for the poor within the precincts of the city of *R.*, if other parishes are afterwards admitted within the precincts of the city, the poor of the parishes admitted shall have a proportion of the charity. *R. Ch. R.* 194.

[If money is left to a ward according to Mr. — his will, the court will (the Attorney-General being a party) decree it to be disposed of as the alderman and principal inhabitants think most beneficial

beneficial for the ward. *Baylis v. Attorney-General*, H. 1741, 2 *Atkyns*, 239.]

If land is vested in trustees for a chapel for the use of the inhabitants of *W.*, the minister shall be chosen by the inhabitants, not by the trustees. 2 *Ver.* 387.

So, if the lord of a manor vests part of the waste in trustees for a school for the parish, which is erected by contribution of the inhabitants. *Dub.* 2 *Ver.* 387.

[If *A.* leaves money by will, to be distributed in charities therein described at the discretion of his three executors, and one dies before filing information; the power of nominating the persons to partake of the charity is continued to the survivors, for it is an authority coupled with an interest. *Attorney-General v. Glegg*, M. 1738, 1 *Atkyns*, 356.]

[But it is so far a trust that the court may interpose, having a more extensive jurisdiction in charities than in other cases. *Ibid.*]

[The executors cannot in such case divide the charity into thirds, and each nominate to a third absolutely, for a determination of every object is left to all three. *Ibid.*]

[If *A.* has power to nominate a master of a school in sixty days after avoidance, on default the dean and chapter in thirty days, on default the bishop; *A.* nominates *B.*, who is not qualified, not being a priest; bishop gives notice of lapse to dean and chapter, who do not nominate; bishop nominates *C.*, who resigns into the hands of *A.* who again appoints *B.*, now a priest: this shall be a good nomination, tho' *C.* had not taken the oaths. *Attorney-General v. Wycliffe*, H. 1747, 1 *Vesey*, 80.]

[If it is quite uncertain whether the donor intended that the capital sum should be disposed of, or only the interest and produce of it, the court will not confine it to the interest and produce. *Attorney-General v. Bucknall*, T. 1742, 2 *Atk.* 328.]

[Where a legacy is given to a charity, interest shall be paid from testator's death. *Attorney-General v. Hayes*, H. 1736, 1 *Atkyns*, 356.]

[The owner of land charged with annuity for payment of a schoolmaster is not excused from the payment when there is no schoolmaster, tho' it continues for years, and without the fault of the owner. *Aylet v. Dod*, H. 1741, 2 *Atkyns*, 238.]

[If *A.* by will gives "to the *Latin* school at *T.*, and if any man "is possessed of it that teacheth boys, and is richly grounded "in the *Latin* tongue, 5*l.* to be paid him yearly for teaching three "boys," it shall be paid to the schoolmaster for ever. *Cheefeman v. Partridge*, M. 1739, 1 *Atkyns*, 436.]

[If a college, having particular powers as to a school, appoints one of their fellows master, and another fellow usher, (which had never been done before,) with an yearly salary, and the usher never attends, nor receives the salary, but the master receives it, and there are but very few boys; the court will order the master to refund the usher's salary to the charity, tho' he says he thinks himself liable to account to the usher for it, and also that he has spent it. *Attorney-General v. Corporation of Bedford*, T. 1754, 2 *Vesey*, 505.]

[If a man devises his real and personal estate to trustees, to pay certain annuities and legacies, and then in trust as to the surplus for those

those persons that are commonly called dissenting ministers, particularly 35 *l. per annum* to him at *B.*, the like to him at *W.*, the like to him at *D.*, it shall be decreed them. *Lloyd v. Spillet*, *M.* 1734, 3 *P. W.* 344, *H.* 1740, 2 *Atkyns*, 148.]

[If *A.* gives to *B.*, minister of the baptists at *M.*, 50 *l.*, and then gives lands to *C.* in fee, chargeable with an annuity to the baptist minister at *M.*, or elsewhere, in the parish of *H.*, with power to distrain, it is a good charity; and shall go to the minister for the time being (this will was made before the mortmain act). *Attorney-General v. Cock*, *P.* 1751, 2 *Vesey*, 273.]

[The court will examine into the reasons for the amotion of a pensioner in an hospital with the same nicety as if his freehold was concerned. *Attorney-General v. Lock*, *T.* 1744, 3 *Atkyns*, 164.]

[Altho' a particular intention in regard to a charity fails, the general intention shall be executed *cy pres*; therefore, on a trust for the vicars of *P.*, provided they should be presented at the recommendation of the trustees; the trustees neglecting to recommend, the Lord Chancellor (the presentation being in the crown) presented, held by *M. R.* that the vicar was entitled to the benefit of the trust. *Attorney-General v. Boulton*, 2 *Ves. jun.* 380. Affirmed on appeal by *Eyre C. J.* and *Macdonald C. B.* at *Serjeants-Inn Hall*, 3 *Ves. jun.* 221.]

[The court will not execute a trust of a charity in a manner different from that intended, unless it cannot be executed literally, but may in substance, by another mode, consistent with the general intent: thus, where the object was to build a church in the parish of *A.*, and the parish would not permit it, it could not be executed anywhere else: but where it was to distribute bread to poor persons attending divine service, and chaunting the donor's version of the psalms, tho' the chaunting of such version could not be allowed, the rest was executed. Cases cited *ibid.*]

[Stock cannot be appropriated to the support of a permanent charity, but must be sold. 1 *Ves. jun.* 44.]

[The only way of administering a charity is under general directions to trustees: the court will not retain an information and execute the trust under it from time to time; but there must be a new information in case of misbehaviour. *Attorney-General v. Haberdashers' Company*, 1 *Ves. jun.* 295.]

[Bequest of residue to *A.*, his executors and administrators, desiring him to dispose of the same in such charities as he thinks fit, recommending poor clergymen with large families and good characters." *A.* died nine years before testatrix, who knew of his death: reference to the master to settle a plan, having particular regard to the recommendation. *Moggridge v. Thackwell*, 1 *Ves. jun.* 464.]

[Bequest of money to be laid out in land for the establishment of a minister of a chapel void by the mortmain act, nor supported by supposing a discretion in the trustees not to lay it out in land, the directions being imperative, that they shall do so. *Grievus v. Cofe*, 1 *Ves. jun.* 548. 4 *Bro. C. C.* 67. *S. C.*]

(2 N 5.) *Circumstances shall be regulated.*] So, Chancery may regulate the manner and circumstances of the gift: as, a devise of 10 *l. per ann. quamdiu* there shall be a sermon every Saturday at *A.* be chosen

chosen by the majority of the best inhabitants was decreed to a catechist, to be approved by the bishop. *R. 2 Ca. Ch. 18.*

So, if a rectory impropriate is devised for the maintenance of a minister, without a reservation of the nomination to himself; the minister shall be instituted by the bishop, and it shall not be a donative. *R. 2 Ca. Ch. 19. 31.*

If an hospital is founded, and by the constitution the annual rent (which was 12*0*l. *per ann.*) is not to be enlarged, nor above three years' rent taken as a fine upon the renewal of a lease for twenty-one years; yet upon an alteration of the prices of provisions, and the circumstances of the times, the annual rent may be augmented. *R. 2 Ver. 596.*

So, if a lease is made of lands given to charitable uses to *A.* at the rent of only a third part of the improved value, in consideration that he had expended divers sums of money for the recovery of the charity, with a covenant that the lease shall be renewed without a fine: the lease shall be renewed, but the rent shall be augmented to a third part of the then present value. *2 Ver. 746.*

If *A.*, having relieved seven poor women of the parish of *L.*, where he inhabited, during his life, by his will gives 28*l.* *per ann.* to be distributed yearly amongst seven poor women, it shall be distributed in perpetuity to seven of the same parish. *Ch. R. 354.*

[Yet alteration of circumstances seems to be in the discretion of the court. *1 Ver. 55.*]

(*2 N 6.*) *Where the use may be improved.*] So, if land be given to a superstitious use, *quoad* the law permits, it may be decreed to a good use. *2 Ca. Ch. 18.*

If it is given to a nunnery, &c. *R. Sal. 162.*

Or, to a popish priest. *2 Ver. 266.*

(*2 N 7.*) *The improvement of the estate distributed.*] So, if lands given to particular uses are improved, the improvement shall be for the augmentation of the same uses in proportion.

But where land is given to an hospital, and a stipend to a prebend, to be warden, is ascertained; the improvement of the rents shall all be distributed to the poor of the hospital. *2 Ca. Ch. 53.*

If a charity is given for the maintenance of twelve poor persons, and an improvement is made at the charge of the parish, the improvement may be applied to other uses of the parish. *Pr. Ch. 225.*

And if trustees are negligent, they shall be decreed to account and assign their estate to other trustees. *Ch. R. 269.*

Who are bound by the decree, *vide in Uses, (N 23.)*

How a decree by commissioners of charitable uses shall be certified to Chancery, and how exceptions shall be taken to it, *vide Uses, (N 24, 25.)*

When Chancery confirms, enlarges, or annuls it, *vide Uses, (N 26, 27.)*

How executed, *vide Uses, (N 26.)*

(2 O 1.) *Certiorari* Bill.

IF there is an action in an inferior court, in which the defendant cannot have right done him, because his witnesses live out of the jurisdiction, or for any other cause; the defendant may exhibit his bill in equity in the nature of a *certiorari* to remove his cause into *Chancery*. 2 *Ver.* 491. *Ch. R.* 203. *Eq. Abr.* 80.

And thereupon the plaintiff in the inferior court shall be put to answer, and the plaintiff in equity may proceed to the hearing of the cause. *Ca. Ch.* 31.

And the plaintiff may insert other matter in the *certiorari* bill, and then there shall be no *procedendo*. *Eq. Abr.* 80.

So, tho' the suit is in a county palatine, a *certiorari* bill lies. 1 Ver.
178.

So, after a *procedendo* upon a *certiorari* bill and a decree in the inferior court, the party shall have a bill here to enforce or remedy it. *Ch. R.* 224.

The plaintiff in a *certiorari* bill ought to give security by bond to prove his suggestion within and if the master does not certify the suggestion proved, a *procedendo* goes. 2 Ver. 492. Vide ante, (D 9.)

If the suggestion is proved, the defendant answers, witnesses are examined, publication passes, and a *subpœna ad aud. judicium* goes. *2 Ver. 492.*

And upon the hearing, the court may determine, or award a *procedendo*. 2 Ver. 492. Ch. R. 224.

So, a *procedendo* may go after publication, before a *subpœna ad aud. judicium*. 2 Ver. 492.

So, after a *subpœna ad aud. judicium*. *Eq. Abr.* 81.

So, the court may grant a *procedendo*, or hear the cause at discretion.
Eq. Abr. 81.

But after a decree to account in the *Exchequer* at *Chester*, &c. or other county palatine, the defendant shall not have a *certiorari* bill, upon a pretence that his witnesses and deeds are out of that jurisdiction. *R. Ch. R. 452. upon a plea of such a decree.*

(2 O 2.) Bill by way of Appeal.

So, a bill lies by way of appeal to proceedings in the spiritual court.

And such bill ought to allege, that the inferior court proceeds unjustly, but need not specify in what particulars. 1 Ver. 442, 3.

(2 P) Common.

C *Hancery* will adjust and settle disputes between commoners. *Wid*
Common.

If a copyholder has the freehold granted to him, with his common, tho' the common is extinct by law, the copyholder shall have it in equity. *R. 2 Ver. 250.*

But a bill ought not to be brought to prove a right to common, till his right be established by a trial at law. 1 *Ver.* 308, 9.

Tho' the plaintiff had the enjoyment for fifty years. *Eq. Ca. 183.*

So, a corporation, which has a manor for the benefit of the inhabitants,

bitants, shall not be allowed to inclose or to make leases, without the consent of the major part of the inhabitants. *Ca. Ch.* 269, 270.

So, a bill shall not be allowed against a grantor of common for overstocking the common. *R. 2 Ver.* 116.

So, *Chancery* will enforce the performance of an agreement for the inclosing of a common, and will set down a commission for settling the title of every one. *Ca. Ch.* 48. *Ch. R.* 18. 144. 3 *Ch. R.* 14.

And will not permit the dissent of two or three persons to hinder the public good. *Ca. Ch.* 48. *Semb. contra 2 Ver.* 103. *Vide infra.*

So, if a common is inclosed for thirty years, *Chancery* will not open it. *1 Ver.* 32.

So, if a woman who has but a small estate in jointure, will disturb an inclosure agreed to by her husband, by which she received benefit. *1 Ver.* 456.

So, an agreement for stint of common shall be decreed, tho' two or three dissent. *R. 2 Ver.* 103.

So, if upon an agreement for inclosure, so much was allotted to the parson, it shall be decreed, tho' a smaller part is accepted of by the succeeding rector, and confirmed by decree in equity. *R. Ch. R.* 144.

But without an agreement for an inclosure, or benefit alleged, the court will not compel a freeholder to assent to it, tho' he is the only person who dissents. *1 Ch. R.* 259. *2 Ver.* 103.

So, if the lord incloses, by way of approvement within the *fl. of Merton*, the court will not establish it before a trial at law, whether sufficient common remains. *R. 2 Ver.* 301. 356.

So, if a greater part of the commoners agree to a stint of common, the court will not enforce the agreement against others who do not agree. *2 Ver.* 575. *Vide supra.*

(2 Q.) Condition.

(2 Q. 1.) How construed.

A Condition shall be modified in equity, in conformity to the intent of the parties: as, if land is settled in trust, (if *A.* secures 500*l.* to his youngest son,) to be conveyed after such security to *A.* and his heirs; and if *A.* does not secure it, &c. to *B.* and his heirs: *A.* does not make the security; this condition precedent shall be construed and regarded in the nature of a penalty, and therefore the conveyance to *B.* shall be subject to the 500*l.* for the portion of the youngest son. *R. Ca. Ch.* 90. *Vide Condition.*

If an executor gives a recognizance, with a condition absolute for the payment of 10,000*l.* to an orphan; and afterwards the estate of the testator falls short; he shall be relieved, and the condition shall be qualified and conformed to the intent and equity of the case. *R. Ca. Ch.* 191.

[Bond given as security for collector of customs, extends not to a subsequent duty where collector has new deputation and gives security. *Bartlett v. Attorney-General*, *M. 8 Ann. Parker*, 277.]

[Or, if no security is given on new deputation. *Bondage v. Attorney-General*, *M. 8 Ann. Parker*, 278.]

If a man devises land to his daughter, with a proviso, that if his son pays to her 50*l.* he shall have the land; this shall be a condition, and tho' the son does not pay at the day, upon which the daughter sells it, the son upon payment afterwards shall be relieved against the vendee. *R. 2 Ca. Ch. 1.*

[If *A.* devise an additional legacy to his daughter, on condition that she marries a man who bears the name and arms of *A.*, and she marries one who three weeks before the marriage calls himself *A.*, it is a good performance of the condition, tho' there is no act of parliament, and equity will not decree him to retain the name. *Barlow v. Bateman, T. 1730, 3 P. W. 65.*]

[If *A.* devises to *B.* 200*l.*, provided she marries with consent of father and mother, she cannot have it till she marries, tho' father and mother consent, for marriage is a condition precedent to the vesting. *Garbut v. Hilton, M. 1739, 1 Atkyns, 381.*]

[A condition inconsistent with the gift is void. *Bradley v. Peixoto, at the Rolls, 3 Ves. jun. 324.* See also *Peixoto v. The Bank of England, ibid. 326. S. P.*]

[Where an estate is given on condition, the taking of possession binds to the performance of the condition, tho' there be a loss. *Attorney-General v. Christ's Hospital, 3 Bro. C. C. 165.*]

(2 Q 2.) Breach of a Condition.

(2 Q 2.) *When aided, if the intent be performed.*] If a condition is literally broken, yet if the intent and substance of the condition be performed, it is sufficient; as, if an estate is devised to *A.*, upon condition that his father settles two thirds of his estate upon *A.* and the heirs male of his body; if the father devises to him for life, and afterwards to his first and other sons in tail male, it is sufficient; for it is pursuant to the intent. *R. 1 Ver. 83.*

So, if a condition is that the lessee do not make an under-lease for more than three years, except to his wife or children, without the consent of the lessor, and the executor of the lessee sells the lease for the payment of debts; the breach of the condition shall be helped, for the term was subject to debts. *R. 1 Ch. R. 170.*

[If a man by will gives money and jewels to trustees, to sell and pay his son's debts, provided the creditors, within four months, accept the composition and discharge the son; if so, he gives 600*l.* to his son, if not, gives it over to his grandchildren, and no tender is made by the executors, but within four calendar months the creditors file their bill, accepting the legacies, and offering to release; it is a performance of the condition. *Franco v. Alvarez, P. 1746, 3 Atkyns, 342.*]

(2 Q 3.) *When it shall be relieved.*] If a condition be broken, yet it shall afterwards be relieved, when it may be afterwards performed; as, if 500*l.* is devised to *A.* if his father releases his right to goods, and if he refuses, then the 500*l.* shall go to the executors of the testator; the father refuses to make the release; yet upon a bill against the father and the executors, *A.* shall be relieved; for the father may afterwards make a release. *R. 2 Vent. 352.*

Tho' it was devised over to the executors; for that was no more than the law implied. *2 Vent. 352.*

So,

So, if a man devises land to *A.* upon condition that he pays 1000 *l.* *per ann.* to his heir for 20 years: if *A.* does not pay at the day, by which the heir enters, *A.* shall be relieved; for when a recompence can be made by interest for the non-payment, relief shall be given. *R. 1 Sal. 156.*

So, if the condition is, that he shall pay debts and legacies, and the heir enters for non-payment. *1 Ch. R. 161.*

If a condition in a lease is, that the lease shall be void on non-payment of the rent and non-performance of the covenants; and the lessor recovers for not repairing the house; the lessee shall be aided upon payment of the damage, which the lessor sustained by the want of repair. *R. Eq. Ca. 91. (2d Part of 2 Mod. Ca.)*

[If *A.* is elected under Dr. Ratcliffe's donation, receives the salary for five years, and then, instead of travelling for five more, as the will requires, upon ill health resigns, and trustees accept, and put another in his room, he shall not refund; tho' if they had refused to accept, possibly he might. *Attorney-General v. Dr. Stephens, P. 10 G. 2. 1 Atkyns, 358.*]

(2 Q 4.) *If a compensation can be made.*] So, when a compensation can be afterwards made; as, if the condition is for payment of money at such a day, and it is not paid at the day. *3 Ca. Ch. 135. 1 Ver. 83. Vide post. (2 Q 9.)*

Tho' the condition is annexed to a voluntary settlement or devise. *R. Ca. Ch. 144.*

If a devise is made with a declaration that the devisee, being evicted, shall have such land; the devisee being evicted of part, shall have a compensation *pro tanto.* *1 Ver. 270. Eq. Abr. 106.*

Tho' there is a devise over, upon failure of payment, within six months, to another; yet the time for payment may be enlarged. *2 Ver. 222.*

So, if the devise is to *A.*, upon condition that he pays 100 *l.* to every one of the devisor's daughters within six months: if the monies are not paid at the day, the devisee, tho' it is a voluntary gift, shall be aided. *R. 2 Ver. 366.*

Or, upon condition that he pays to his daughter, who is also his heir, 100 *l. per ann.* till 300 *l.* is paid. *R. 2 Ver. 594.*

And tho' the daughter enters for non-payment, and sells the land, the devisee shall be aided against the vendee; for the condition was in the nature of a security for payment. *Eq. Abr. 106.*

So, if the condition be, that upon payment of a portion to a daughter by *A.* the land shall go to *A.* and his heirs, and *A.* dies before the day of payment; his heir upon payment shall have the land. *R. Eq. Abr. 107.*

If the condition be, that if the father does not release to the executor, the legacy to his son shall be void; if the father refuses to release, at first, but afterwards does release, the son shall be aided. *Eq. Abr. 108. 2 Vent. 352.*

But a devisee shall not be aided, without paying all interest from the day of payment. *2 Ver. 594.*

Without deduction for taxes, tho' directed to be paid by the devisee out of his estate. *2 Ver. 595.*

(2 Q 5.) *If the breach was procured by fraud.*] So, if the condition is broken by the fraud or practice of him, who is to have the advantage of it. *R. 1 Rol. 374. l. 35. D. 3 Ca. Ch. 134.*

(2 Q 6.) *If the condition was in terrorem.*] If a condition is added only *in terrorem*; as, if a portion is given to a woman, upon condition, that she does not marry without the consent of such a person, without a limitation over; if she marries without the consent, yet she may be relieved. *R. Ca. Ch. 22. R. 1 Ch. R. 121. R. 2 Ver. 293, 4. R. Skin. 286. Eq. Abr. 110. Vide post. (3 Z 5, &c.)*

[And if there be a consent in writing after the marriage, she shall be relieved, tho' there was a limitation over. *Ambler, 256.*]

[So, if there be a settlement on two daughters, provided that, if either of them marry without the consent of their mother, it should be to her (the daughter's) separate use; and the mother propose and encourage a marriage with one of them, and afterwards refuse her assent; if in such a case, the daughter marry the person *without* the mother's consent, the estate shall not go to the separate use of the daughter. *Ambler, 263.*]

[But this is only as to personal estates; for if the portion is to arise out of lands, and there is no devise over, it shall go to the heir; and the money is to be laid out in lands. *Pulling v. Reddy, T. 16 G. 2. Wilf. 21.*]

[If a mother by will gives her daughter *A. 800 l.* if she marry with consent of trustees in writing, and not otherwise, and charges her real estate with her debts and legacies, and *A.* marries without consent; this is a personal legacy, and shall be paid (had it been originally charged on land it should not); and if the personal estate is exhausted by payment of debts or legacies, the real estate shall make it good *pro tanto*. *Reynish v. Martin, P. 1746, 3 Atkyns, 330. Wilf. 130.*]

[If a man by will gives *1500 l.* to each of his grand-daughters on their day of marriage, and desires they should not marry without consent, &c. and therefore if any should marry without consent, revokes what was to be paid her, and she shall not be entitled to any benefit, *further than the father and mother or survivor of them shall direct*; and after the legacies and sums directed to be paid are satisfied, gives the residue to his daughter for life, and then to *B.*; this is not a devise over, but a power to the parents to abridge; therefore the condition is *in terrorem* only, and a grand-daughter marrying without consent shall have the *1500 l.* *Wheeler v. Bingham, T. 1746, 3 Atkyns, 364. Wilf. 135.*]

So, if land is devised upon condition that she shall not marry. *D. 3 Ca. Ch. 135. Vide Com. Rep. 729. Skin. 286.*

So, if *200 l.* are devised, *if she behave herself dutifully to her mother*; it shall be paid, tho' she marries without the consent of the mother. *R. 1 Ch. R. 122.*

But if the portion of land is devised over to another, if she marries without consent; she shall not be relieved upon a marriage without that consent. *R. Ca. Ch. 22. R. Ca. Ch. 142. 1 Vent. 199. Fry and Porter.* Upon an appeal from a decree of the Master of the Rolls to the contrary. *1 Mod. 300, &c. 2 Ver. 87. 357. 452. Vide post. (3 Z 5, &c.)* [If

[If *A.* by lease and release limits his estate to himself for life, &c. with a trust of a term, that if there should be a son and two or more daughters, the trustees were to raise and pay to each 2000 *l.* if she marry with consent of her mother, and in the mean time directs maintenances; and if any die before the portion paid, then it is not to go to her executor, but the estate to be exonerated of it, or, if raised, to go to him to whom the reversion of the estate is limited; and afterwards, by will, *A.* directs 2000 *l.* a-piece more to each, out of his personal estate, as an augmentation of her original portion, and subject to the same conditions; and if any dies before the original portion becomes payable, then this legacy of 2000 *l.* not to go to her executor, but to his widow and executrix: and *A.* dies; and on bill filed the court orders the maintenances to be raised immediately, and then two of the daughters marry without consent; they are not entitled either to the original portion nor to the legacies. *Hervy v. Aston*, *P.* 1737 and *T.* 1738, *per Hardwicke C.* *Lee C. J.* *Willes C. J.* and *Comyn J.* unanimously, 1 *Atkyns*, 361.]

[If a condition is annexed by will to a devise of real or of personal estate, (as marrying with consent,) and no notice is required to be given, there the legatees must perform the condition, or they cannot be entitled; and if there is a devise over, forfeiture incurs. *Chauncy v. Graydon*, *T.* 1743, 2 *Atkyns*, 616.]

[If one child forfeits by marrying without consent, and next day another does the same; he forfeits the share of the forfeiture of the first, as well as the original portion. *Ibid.*]

So, if the marriage be a condition precedent to the vesting of the estate. *R.* 3 *Ca. Ch.* 130. *Vide post.* (2 *Q* 8.)

Yet, a devise to a woman, upon condition that she does not marry without the consent of *A.* and *B.*, and if she does, to such persons as *A.* and *B.* shall nominate, otherwise to *A.* and *B.* themselves; if she marries without consent, the portion shall go the trustees. *R.* *Ca. Ch.* 58. seems as if the devise to persons, who are to consent, shews the intent to be only *in terrorem*.

[So, if *A.* gives his daughter *B.* 2000 *l.* payable at twenty-one or marriage, if she marries with consent; provided if any of the legatees die before their legacy payable, it shall be divided between the survivors; and *B.* marries under age; it is a devise *in terrorem* only, and the legacy vests on the marriage. *Underwood v. Morris*, *P.* 1741, 2 *Atkyns*, 184. The authority of this case is denied, 1 *Brown*, 304. 2 *Brown*, 488.]

So, a devise to daughters, and if they marry without the consent of the executors, over to others: if the daughters arrive at full age, they shall have their portions; for it shall not be intended that they are to be restrained to the consent of the executors, but only whilst under age. *R.* in *Canc. int.* *Lloyd and Hughes*, *T.* 2 *Jac.* 2. *Semb.* *cent.* 452.

If a woman releases her portion charged upon land to her grandfather, at the request of her father, who promises to make an improvement and to take care of her portion, and afterwards devises, that the portion shall be paid, if she marries with the consent of his executor, otherwise he gives her only the interest thereof for her life; tho' she marries without consent, all the portion shall be paid; for it was a debt to her from her father. *R. Ch. R.* 145.

[If

If a devise is to a daughter, and if she does not marry with the consent of the executors, to the daughters of one of the executors; if *A.* makes his addressee to the daughter, with the privity of the executors, and afterwards marries her, he shall have the portion, tho' there was no express consent. *R. 2 Ver. 580.*

[If a fortune is settled on *A.*, provided she marries with consent of three trustees, if not, over to others; and *B.* makes a proposal to one of the trustees, who communicates it to the other two; they all disapprove of it, unless the father of *B.* will make a better settlement, and write a letter to that purpose to their agent, and say, "if he does," we believe the young folks are too far engaged, and "*we shall be obliged to consent*;" and by another letter to their agent they refuse to consent on any other terms; and *B.* and *A.* marry privately, and after that *B.* applies to the other two trustees, who tell him they will not consent but on the above terms: yet if there is no objection to the person or estate of *B.*, and the settlement is not disparaging, the words *we shall be obliged to consent*, shall be construed a present consent, and the condition well performed. *Daley v. Desboverie*, 1738, 2 *Atkyns*, 261.]

So, if a devise is to *A.* upon condition, that he does not dispute his will; it will not be a breach, if there is a probable ground of contest. *R. 2 Ver. 91.* [*Morris v. Burroughs*, *H.* 1737, 1 *Atkyns*, 399. *Lloyd v. Spillet*, *M.* 1734, 3 *P. W.* 344, *H.* 1740, 2 *Atkyns*, 148.]

If a man charges land with a portion for his daughter, at the age of twenty-one, or marriage; but if she marries without the consent of her mother during her life, (who was her guardian,) part thereof to go to the payment of his debts: after the age of twenty-one, a marriage without that consent does not forfeit any part of the portion. *R. Eq. R. 26. Reversed temp. G. 2. Vide Com. Rep. 726.*

[On this subject of conditions in restraint of marriage, lord *Thurlow* expresses himself thus: the early cases refer in general to the canon law as the rule by which all legacies are to be governed. Towards the latter end of the last and beginning of the present century, the matter is more loosely handled: no reference is made to the canon law, as affording too positive a rule, but these conditions are treated as partaking of the force allowed them by the law of *England*, but at the same time as unfavourable to the good order of society: at length it became a common practice that such conditions were only *in terrorem*. I do not find it was ever seriously supposed to be a testator's intention to hold out the terror of that which he meant should never happen: but the court has made such conditions amount to no more. Provisions against improvident marriages during infancy or to a certain age could not be thought an unreasonable precaution for parents; the custom of *London* has been found reasonable.]

[About the middle of the present century doubts arose which divided the opinions of the first men of the age. The difficulty seems to have been in reconciling the cases. The prevailing opinion was, that devises of land should follow the rules of the common law; and legacies of money the rules of the canon law.]

[The question remains yet unresolved, what is the nature and extent

tent of the rule? An injunction to ask consent is lawful, as not restraining marriage generally: a condition that a widow shall not marry is not unlawful; an annuity during widowhood; a condition to marry or not to marry *Titius*, is good; a condition prescribing due ceremonies and place of marriage is good: still more is a condition good which only limits the time to twenty-one, or any other reasonable age, provided it be not used evasively, as a cover intending to restrain marriage generally. It is agreed on all hands, that (however restrictive of marriage) when the legacy is given over to other uses, the testator shall be deemed to regard those uses. 2 *Brown*, 488.]

[Condition in restraint of marriage under twenty-one, without the consent of trustees, established both as to a rent-charge and a personal legacy. *Stackpole v. Beaumont*, 3 *Ves. jun.* 89.]

[Condition by will requiring consent of trustees to a marriage not applicable to the second marriage of a daughter, whose first marriage was between the date of the will and the death of the testator, and who was a widow at his death. *Crommelin v. Crommelin*, 3 *Ves. jun.* 227. See also *Hutchinson v. Hammond*, 3 *Bro. C. C.* 128.]

[Legacy to plaintiff in case of marriage with consent of parents; they consent, by a writing, generally to any marriage she may contract: after the decease of the survivor plaintiff marries; consent was only necessary during the lifetime of the father and mother, or the survivor; if otherwise, this general consent is sufficient. *Mercer v. Hall*, at the Rolls, 4 *Bro. C. C.* 326.]

[A provision on condition, by an elder brother for younger children unprovided for, shall be construed in the same manner as provision by a father. *Berkeley v. Ryder*, T. 1752, 2 *Ves.* 429.]

[Money to be paid *nomine pœne* for non-payment of the principal sum, shall only stand as a security for legal interest for it. *Aylet v. Dod*, H. 1741, 2 *Atkyns*, 238.]

[But a *nomine pœne* in a lease to a tenant, to prevent breaking up old pasture ground, is otherwise, and the whole shall be paid. *Ibid.*]

(2 Q. 7.) *If it was broken only in circumstances, or became impossible by the act of God.*] If a condition is broken only in circumstances, but the substance is performed; as, if the condition be, that the party shall not do a thing, without consent in writing, and there be a consent without writing. *Ca. Ch.* 141. 3 *Ca. Ch.* 130.

If an estate is devised upon condition, that the devisee shall convey two parts to *A.*, and if he does not, devised over to another; if he does not convey exactly two parts, but tantamount in value, it is sufficient. *R. Ca. Ch.* 131.

[If a man devises lands to *B.* and his heirs, on condition that he marries *C.*, and *B.* by will declares himself ready to marry her, and she by her answer declares she will not marry him, and afterwards marries another, and dies; the condition is dispensed with. *Robinson v. Comyns*, H. 9 G. 2. *C. T. T.* 164.]

So, if a condition subsequent becomes impossible by the act of God. *D. 3 Ca. Ch.* 135. *Vide 1 Ver.* 83.

[If a man gives 1000 *l.* to his daughter, to be paid at twenty-one or marriage, provided she marry with consent of executors, if she dies

dies before the money payable on these conditions, the money to his sons; and all the executors die before she marries, she is entitled to the 1000*l.* *Graydon v. Hicks, M. 1739, 2 Atkyns, 16.*]

[But if there is an administrator with the will annexed, his consent is required. *Ibid.*]

(2 Q 8.) *When it shall not be relieved. Where the condition is precedent.*] But if the estate is limited upon a condition precedent, the breach generally shall not be relieved. *R. Ca. Ch. 130. 135. D. 1 Ver. 83.*

As, if an estate is devised to *A.* if she marries to such a one, otherwise to *B.* if she does not marry the same person, the estate does not vest, and she shall not be relieved. *R. 3 Ca. Ch. 130. 2 Ver. 338. 9.*

Yet where the condition precedent is not performed, but there was no default in the party, who omits the performance, *Chancery* will give relief; as, if a devise is to *A.* for three years, and if a lady, who was his heir at law, intermarries with *B.* within three years, then to her and the heirs of her body: if the marriage was omitted by the default of *B.*, *Chancery* will relieve. *R. cont. in Chancery, but the decree was reversed in Parliament, 1 Sal. 232.*

If a man devise, that if his daughters release to his heir such and such lands, he gives them such and such portions; and one of the daughters dies before the release, the rest shall be relieved; for such a breach may be compensated. *Semb. 1 Ver. 222, 3.*

If the devise be, that if *A.* secures 500*l.* to his daughters, the trustees shall convey to *A.* and his heirs; if *A.* dies before the 500*l.* is secured, if it was afterwards secured, the trustees ought to convey. *Ca. Ch. 89. Eq. Abr. 107.*

[*A.* by will gave a rent-charge to his sister payable half-yearly, and said that he gave it her in lieu and satisfaction of all claims she might have on his real or personal estate, and upon condition that she release all right and claim thereto to his executors and trustees; the sisters lived several years without executing any release, and it was holden that the sister's husband was not entitled to the arrears of the annuity. *Acherley v. Vernon, C. P. E. 12 G. 2. Willes, 153. Com. 513. Fort. 188. S. C.*]

[The release was a condition precedent; but if it were only a condition subsequent, it ought to have been performed in a reasonable time, within six months, or, at all events, during the life of the grantee. *Ibid.*]

(2 Q 9.) *Where recompence cannot be made.*] So, equity does not relieve for a condition broken, where there is no proper measure for recompence: as, if the condition is, that a lease shall be void, if the lessee assigns without licence. *R. Eq. Ca. 113.*

So, tho' the condition is subsequent, there shall be no relief, if there cannot be a compensation for it. *Eq. Abr. 108.*

(2 Q 10.) *If the relief is not prayed in convenient time.*] So, if a lessor enters for a condition broken, and recovers in ejectment, and offers to take his arrears of rent and costs, which *A.* the assignee of the lease refuses, for which reason the lessor demises to another: *A.* shall

shall not afterwards be relieved against the breach of the condition in equity. *R. 1 Ver. 450.*

So, if the condition is, that by non-payment the estate shall cease both in law and equity; if the party does not pay at the day, he shall not be relieved, it being a voluntary settlement. *1 Ver. 456, 7. Cont. 2 Ver. 366. Vide ante, (2 Q 4.)*

If a devise is to the eldest daughter, upon condition that if she does not pay so much to the other daughters within six months, it shall go over to the second daughter, upon the same condition, and if she does not pay, to the third, &c. After six months, the eldest daughter shall not be relieved. *Dub. 2 Ver. 166. Vide 2 Ver. 222. contra.*

So, if a devise is to the eldest son by a second wife in tail, and if he dies without issue, to the eldest son by a former wife, upon condition that he pays 1000 *l.* to the daughters by the second wife; the tenant in tail suffers a recovery of a moiety, and then dies without issue; the eldest son by the first wife shall not have the land; without payment of the whole 1000 *l.* *Eq. Abr. 106. 2 Ver. 359.*

But a devise to three daughters, upon condition, that they release all their share to the estate of the testator, shall be construed distributively; and each of the daughters releasing shall have her legacy. *Eq. Abr. 106. 2 Ver. 478.*

(2 R) Confirmation.

IF tenant for life makes building leases, for the advantage of the estate, to which the remainder-man consents by *parol*; he shall be decreed to make a confirmation, after the death of the tenant for life. *R. 2 Ca. Ch. 28.*

Vide Confirmation.

(2 S) Contribution.

IF a charge is upon a manor, &c. and the whole is levied upon one tenant; the court will make all liable to make contribution. *Vide ante (2 I).*

As persons who purchase part of a manor subject to a charge. *R. Hard. 13.*

[But if tenant in tail, subject to an incumbrance, suffers a recovery of part, and exchanges it for other lands; this is not subject to a contribution to the incumbrance, the whole of which must be paid by the remainder. *Kirkham v. Smith, T. 1749, 1 Vesey, 258.*]

So, if one surety pays the whole debt, *Chancery* will make the other contributory for his proportion. *Ch. R. 203. Vide post. (4 D 6.)*

If there is judgment in debt against the sheriffs of *London*, for an escape, and one pays the whole money; he shall have contribution against the other sheriff, and if he is dead, against his executor. *Dub. Hard. 164.*

But the antient tenants or copyholders of a manor are not liable to a contribution towards a bridge-wall to which the manor is charged. *R. Hard. 131.*

Tho' the copyholders are enfranchised of late years; for that only varies the tenure. *Hard, 131.*

(2 T) Conveyance:

(2 T 1.) When aided.

(2 T 1.) *When there is a mistake in the deed.*] *Chancery* will aid a mistake in a conveyance or other deed; as, if in a lease, &c. by a corporation, the body politic is misnamed. *Vide post.*

(2 T 6.)

So, if the name of the lessor, or of the lessee, is omitted, or mistaken.

So, if land in *A.* in the tenure of *John D.*, where it was intended *Ralph D.*, is conveyed, and *John D.* holds nothing there; it shall be aided. *Dub. 2 Ca. Ch. 43.*

If a farm called *Hafledon* is conveyed as lying in *A.*, when it lies in *A.* and *B.*, and the party hath declared that he had conveyed such a farm, it shall be so decreed. *R. 2 Ca. Ch. 68.*

So, if in the conveyance of an inheritance, the word *heirs*, is omitted.

(2 T 2.) *When part of the land is omitted in the deed.*] So, if part of the land intended to be conveyed is omitted.

As, if the deed conveys only one messuage, with the appurtenances; other lands demised with the messuage, and occupied under the same lease, at the same rent, and intended to be purchased, shall be comprised.

(2 T 3.) *When more is inserted than was intended.*] So, if more land is inserted than what was intended to be conveyed; as, if a copyhold is escheated, and afterwards the manor is conveyed by words sufficient to pass that copyhold, but it was not inserted in the particular, nor intended to be granted in demesne; the vendor shall have a decree to hold it by copy of the purchaser. *R. 2 Vent. 345. Vide post. (4 L 2.)*

So, if more land is inserted in a fine than was intended to be comprised.

So, where a covenant is general, and the party is seised, when the intent was, that he should covenant only against his own act. *R. Ca. Ch. 15.*

(2 T 4.) *When the conveyance is lost.*] So, if a conveyance is lost, *Chancery* will enforce a new assurance.

So, where a conveyance was pretended, but not proved, but the guardian of the defendant articulated for the enjoyment, and gave possession to the plaintiff, the court decreed for the plaintiff. *Ca. Ch. 48.*

[If there is proof that the deed was destroyed by a party, the court will relieve; but if it is lost, the matter must be determined at law. *Askew v. Poulterers' Company, M. 1750, 2 Vesey, 89. Clavering v. Clavering, P. 1750, 2 Vesey, 233.*]

(2 T 5.) *When the conveyance is defective.*] So, *Chancery* aids a defective conveyance; as, where upon a feoffment livery is omitted. *Ca. Ch. 240.*

If a bargain and sale is not inrolled. *1 Ch. R. E. of Oxford, 10.*

If to a grant of reversion, there is no attornment.

[If a rent-charge is limited to *A.*, and after her decease to the heirs of her body, and such heir during her life conveys to *B.* without fine, which would operate as an estoppel if he survived her; after *A.*'s death, *B.* is entitled to further assurance from the heir, and to make use of his name to recover arrears. *Whitfield v. Fauisset, H. 1749, 1 Vesey, 387.*]

If a copyhold is surrendered by way of mortgage for money, and the surrender is not presented. *R. Ca. Ch. 171.*

Or, if there is a defect in the surrender. *1 Ch. R. 108.*

If a lease is made to *A.* and *B.*, and their heirs *habend.* for 99 years, where it was for payment of debts. *R. Ca. Ch. 249. Vide post. (4 W 14.)*

So, where no surrender appears to a copyhold, after a possession of forty years. *R. 1 Ver. 195. 2 Ca. Ch. 150.*

If no livery appears to a lease for life, after a possession for twenty-five years. *R. 1 Ver. 196.*

If livery is wanted to a feoffment by tenant in tail, which makes a discontinuance. *Ca. Ch. 240.*

If *A.* revokes a prior settlement, and covenants to stand seised for the benefit of his son upon his marriage, but the words, *shall stand and be seised*, are omitted. *R. Ch. R. 163.*

[If *A.* upon a loan of money gives a letter of attorney to confess judgment in ejectment for such and such lands. *R. 2 Ver. 151.*]

(2 T 6.) *Or mistaken.*] So, if a man upon his marriage settles an estate for the jointure of his wife, in the same manner as if he had the inheritance; and afterwards the inheritance is evicted, and it appears that the husband had only a term for years: the wife shall have the term for her life. *R. Ca. Ch. 47. Vide ante, (2 T 1.)*

If a bond is made in the penalty of 40*l.* for the payment of 200*l.* it shall be aided; for it was a mistake. *R. 2 Ca. Ch. 225.*

So, if the husband having a term conveys it to his wife and her heirs by lease and release, in consideration of a bond cancelled, which was given for the making of a jointure for the wife, and the wife devises it and dies; the husband shall assign the term to the devisee. *R. Eq. Ca. 143.*

[If by articles and settlement in the same words, and both before marriage, husband is made tenant for life without waste, remainder to the heirs male of his body, with power to raise portions for younger children, and levies a fine, this shall be rectified by Chancery for the son, and the father made tenant for life only; for it is nugatory in settlement for valuable consideration to make him tenant in tail; but if son has a benefit by his father's will, he must make his election. *Roberts v. Kingstey, P. 1749, 1 Vesey, 238.*]

(2 T 7.) *If it is aided it shall be in the same plight as it would have been if it had been right in initio.*] If a defective conveyance is aided, it shall be discharged of *mesne* incumbrances by the party; as, if a mortgage wants livery, and thereupon the heir confesses judgments to another, the mortgagee shall be relieved, and discharged from the judgments. *R. Ch. R. 29.*

A lease not being made pursuant to an agreement, if the lessor afterwards settles the reversion in such manner, that the covenants of a former lease may be performed on the part of the lessor; if the lessee performs his part, equity will assist him to detain possession, as if the prior lease had continuance. *R. Eq. Ca. 59.*

(2 T 8.) When a Conveyance shall not be aided.

But if tenant in tail bargain and sell his land, *Chancery* will not decree a fine or recovery, tho' the vendor had power to levy them. *Dict. 2 Vent. 350. Vide post. (4 S 2.)*

[If *A.*, remainder-man in tail, expectant on the death of his uncle, tenant for life, being distressed, conveys manors of 300*l.* per ann. for 300*l.* to *B.*, his heirs and assigns, after the uncle's death without issue-male, it is void in law, and shall not be aided in equity. *Barnardiston v. Lingwood, H. 1740, 2 Atkyns, 133.*]

So, a conveyance shall not be helped upon a subsequent communication. *2 Ch. R. 107.*

Nor, a defect in articles, after a conveyance executed. *R. 2 Ch. R. 107.*

(2 T 9.) *If it be voluntary.*] So, if a voluntary conveyance is defective, *Chancery* will not aid it. *2 Vent. 365. Semb. Ca. Ch. 47. 1 Ver. 456. 1 Ch. R. 147, 8. [1 Ves. jun. 54.] Vide ante, (2 C 8.) post. (4 H 9—4 O 7.)*

So, if *A.* covenants to make a jointure of 500*l.* per ann. without saying of what lands, and afterwards settles a farm in *A.* of 50*l.* per ann. and then makes a voluntary settlement of 200*l.* per ann., if part of the farm lies in *B.* it shall not be decreed against the heir, tho' a jointure was not settled to the value agreed; for as to that estate the conveyance was voluntary. *R. 2 Ca. Ch. 68.*

If a man settles lands in *A.*, *B.*, and *C.* upon himself for life; and then to his issue, and for default thereof to his nephew *H.* the lands in *A.*, and to his nephew *L.* the lands in *B.* and *C.*, omitting one farm; equity will not supply the omission, tho' proved to be a mistake. *R. 1 Ver. 38.*

Yet a devisee shall not be aided against a voluntary settlement made without a power of revocation. *1 Ver. 100.*

A fortiori if there be a voluntary conveyance for the provision of younger children, it shall be aided. *2 Vent. 365. 1 Ver. 40. 132.*

So, a lease shall be decreed to attend the inheritance settled by a voluntary conveyance. *1 Ch. R. 37.*

So, if articles upon marriage are, that money shall be vested in a purchase of land to be settled upon the husband and wife for life, then to the issue of their bodies, then to the right heirs of the husband; he and his wife die, and their children die; the heir of the husband shall enforce the settlement. *Cont. per North, and afterwards decreed, 1 Ver. 298. 471. 2 P. W. 255.*

So, a woman entitled to dower shall be aided against a defective settlement, surrender, or execution of a power. *R. 2 P. W. 637. Vide post. (3 Z 1.)*

So, a covenant, that a limitation in fee being by mistake made to him and his heirs, the party will stand seised to the use of his wife and her heirs, shall be decreed. *2 P. W. 464.*

A conveyance, covenant, &c. being by deed, *prima facie* imports a consideration. 2 *P. W.* 467.

As, if a father assigns a college-lease to a son, and covenants to renew. *Ibid.*

[Slight consideration by a parent for a child sufficient even against a purchaser. 2 *Ves. jun.* 410.]

[Bill to have a voluntary deed delivered up dismissed. Cross-bill to execute it retained for a year, with liberty to bring an action on a covenant contained in it. *Colman v. Sarrel*, 1 *Ves. jun.* 50. 3 *Bro. Ch. Ca.* 12. *S. C.*]

[Clause in a deed of assignment of stock from a married man to a married woman, that she shall live where he resides, tho' suspicious, is not sufficient ground to hold it *pro turpi causa*. *Ibid.* 1 *Ves. jun.* 51. 3 *Bro. Ch. Ca.* 12. *S. C.*]

[Want of collateral allegation shall not prevent the court from looking into the consideration. *Ibid.*]

[Creditor impeaching a settlement for fraud must get judgment for his debt, and state that he is defrauded by the settlement. 1 *Ves. jun.* 161.]

(2 T 10.) Or, against him who has an estate upon good consideration. So, a defective conveyance shall not be aided against him, who has an estate upon a good consideration; as, if a surrender of a copyhold fold or mortgaged is not presented, but afterwards the vendor surrenders it to the use of his will, and devises it to his wife for life, upon whom he had agreed to settle it upon their marriage; the vendee shall not be relieved against the wife. *R. Ca. Ch.* 171. *Vide ante*, (2 C 8.)

[If a rent-charge is limited to *A.*, and after her death another rent-charge to the heirs of her body, and *A.* and her husband levy fine of the lands, and sell them to *B.*, and the heir during her life sells the rent-charge to *C.*, this sale shall not put *B.* in a worse condition, or liable to a different remedy than would have been to the heir, and *C.*, purchaser of an equitable title, must try it against *B.* at law. *Whitfield v. Fauisset*, *H.* 1749, 1 *Vesey*, 387.]

If a mortgage to *A.* is defective, it shall not be aided against him, who has a subsequent mortgage by a good assurance. *Eq. Abr.* 320.

(2 T 11.) When a Conveyance shall be avoided.

So, a fraudulent conveyance shall be avoided in equity; as, if it be obtained by false information. *Ca. Ch.* 74. *Vide ante*, (2 C 12.) *Vide post.* (3 M 1.—4 L 1.)

By insinuation of a match to be obtained thereby. 1 *Ver.* 206.

[So, a conveyance obtained from persons uninformed of their rights shall be set aside, tho' there was no actual fraud or imposition. 2 *Brown*, 150.]

[A remainder to the husband in a marriage settlement, to which the wife objected at reading, and denied she had desired it, (tho' his attorney had told him so,) but executed the writings as remainder was remote, and the parties unwilling to defer, may be set aside as a fraud and imposition. *Morris v. Nixon*, *H.* 5 *G. Str.* 144.]

So, if there is a suspicion of an imposition: as, where a woman levies a fine of her estate to the use of *B.* and his heirs, but at the

time declares it is necessary for her to have a trustee, and by her will declares that she had levied a fine in trust for herself, and devises the estate to C. and his heirs, subject to the payment of debts, and B. gave no consideration, he shall be decreed to convey to C. *R. 2 Ver.* 307.

[If a man is arrested by due process, and then executes a conveyance never under consideration before, the court will construe it *duress*, and relieve against it. *Nichols v. Nichols*, *M.* 1737, 1 *Atkyns*, 409.]

[Tho' a man has a real intention of disinheriting his heir at law, yet if it is owing to fraud and imposition, this will fetch it back and re-vest it in the heir. *Bennet v. Vade*, *T.* 1742, 2 *Atkyns*, 324.]

[If a voluntary conveyance is made by a very weak man, in favour of one who has great power and influence over him, and of others who have no merit with him, and the deed contains a proviso, restraining him during his life from taking a fine, or leasing without the full rent, and a power of revocation only in the presence of three persons by name, who could hardly be assembled, and the deed is executed without being read to him, and no part is left with him, it shall be delivered to the heir at law, and possession of the estate given him, and the trustees convey to him. *Ibid.*]

[But if there is a provision for creditors in it, that shall be saved to them. *Ibid.*]

[If a counsel procures from his client a grant of the stewardship of a manor in fee, it is not only *ipso facto* void, as it might come to a woman; but if it appears the grantor did not read it, nor know what the import of *his heirs* was, and only intended to give it during pleasure, it shall be delivered up. *Thornhill v. Evans*, *T.* 1742, 2 *Atkyns*, 330.]

[If devisees submit their differences to arbitration, and an award is made, that the lands shall be conveyed in the same manner as they are given by the will, and thereupon by deed to lead the uses of recovery the lands are declared to be to A. for life, whereas she is entitled to them in fee by the will, the court will order them to be conveyed to her in fee. *Ridout v. Pain*, *P.* 1747, 3 *Atkyns*, 486.]

If an infant has the trust of an estate, and A. enters and levies a fine, and five years pass; tho' the infant is barred by the fine and non-claim at law, because the trustees were of full age, yet the fine shall be avoided in equity, by a bill brought within five years after the infant's full age. *R. 2 Ver.* 369.

If one parcener obtains an assignment of the part of the other for 20*l.* consideration, and upon a false suggestion, that a large fine was to be paid for the admission to the estate, when the estate was of 200*l. per ann.* value, and only a small fine due; such assignment shall be avoided. *R. Eq. Ca.* 85.

[If A. tenant for life, prevails on his daughter, tenant in tail, to join in a recovery (to prevent the estate's falling into her husband's creditors' hands) to him and his heirs, promising to be only a trustee for her, and then mortgages it, but pays her an annuity of 30*l. per annum*, becomes bankrupt, and dies, and the daughter dies; the recovery shall be set aside, and on the heirs in tail refunding the 30*l. per annum* received, the assignees of the bankrupt shall assign to them, and the mortgagee on payment re-convey to them, and they

they come in creditors under the commission for the mortgage-money. *Young v. Peachy*, H. 1741, 2 *Atkyns*, 254.]

And a conveyance obtained by fraud or imposition shall be avoided, tho' it is confirmed by fine, and several approbations of the party. 2 *Ver.* 206.

So, a conveyance by the king's patent may be avoided by bill in equity for deceit, or imposition on the king. R. 1 *Ver.* 277. 387. 390.

[If a guardian purchases his ward's estate immediately on his coming of age, tho' it has a suspicious look, yet if he paid a full consideration, it shall not be set aside. *Oldin v. Samborne*, M. 1737, 2 *Atkyns*, 15.]

[If A. grants an annuity to B. in consideration of his learning, and the love he bore him, it is not a valuable consideration. *Stiles v. Attorney-General*, H. 1740, 2 *Atkyns*, 152.]

[But if B. gave up a pecuniary advantage at the request of A., it amounts to a valuable consideration. *Ibid.*]

[Or, if there be arrears on the voluntary annuity, and B. promises not to sue for these arrears, and A. thereon grants the annuity afresh, this is a valuable consideration, and also for an additional annuity. *Ibid.*]

[Altho' the lord's estate will preserve a contingent remainder of a copyhold, so as to prevent the destruction of it by the tenant for life, it will not support it where the preceding estates are expired. 2 *Ves. jun.* 209. 214.]

[Tenant for life of a copyhold, remainder to his first and other sons in tail, took a conveyance in fee from the lord. The premises descended on his eldest son, who by will charged all his real estate with debts and legacies, and devised it to his brother for life, with various remainders: held *per* Lord Chancellor, that no equity could keep alive the entail; when the interest of the lord is united with the copyhold in tail there must be a merger; for the method of barring it cannot exist. *Challoner v. Murball*, 2 *Ves. jun.* 524.]

[A widow shall not have free-bench of trust estate in a copyhold. *Tudor v. Wade*, 4 *Bro. C. C.* 521.]

[The entry of the widow as guardian to the son does not prevent his having such a seisin as to convey title to his customary heir. *Ibid.*]

[A surrender supplied for children, whereon the heir is provided for, tho' the provision be not from the testator. *Pike v. White*, 3 *Bro. C. C.* 286.]

[So, in a wife. *Ibid.* 229.]

[A general charge upon land for payment of debts, where testator had freehold and copyhold, the copyhold held liable. *Kentish v. Kentish*, 3 *Bro. C. C.* 257.]

[A surrender shall be supplied for a limited interest, for a wife for life, tho' the devisees over, nephews and nieces are not entitled to have it supplied for them. *Marston v. Gorvan*, 3 *Bro. C. C.* 170.]

[Testator by his will taking notice that he had not surrendered copyhold estates, which he devised, but directing his son to convey them, and devising to the son other estates, tho' the copyholds are not devisable by custom, yet the surrenders decreed to be made. *Wardell v. Wardell*, 3 *Bro. C. C.* 116.]

[On the bill of the lord, a commission issued to distinguish copyhold lands within the manner comprised in admittances produced, the last in 1693, from freehold, and compounded from uncompounded copyholds, and to ascertain the boundaries, and if they could not be distinguished, to set out lands of the tenant of equal value with so much of the copyhold lands as could not be distinguished. *The Duke of Leeds v. Earl of Strafford*, 4 *Ves. jun.* 180.]

(2 T 12.) When not.

(2 T 12.) *Tho' made upon a false suggestion.*] But it is not sufficient to avoid a conveyance, that it was obtained upon false insinuations; as, if a man falsely persuades another that his son is dead, and thereby obtains a devise of the estate to himself. *Vide post.* (3 A 2.)

If a man under an arrest is concealed, and denied to his relations, and persuaded to make a devise of his estate to a stranger. *R. 3 Ca. Ch.* 61. 94. 103.

(2 T 13.) *Tho' it becomes unreasonable by matter ex post facto.*] So, it is no reason for avoiding a settlement, that it became unreasonable by matter *ex post facto*; as, a marriage settlement, which settles a jointure equivalent to a portion, and a security to repay the portion also, if the husband dies without issue, shall not be avoided, if the husband dies without issue within a week. *R. in Chancery, and confirmed in Parliament, Ca. Parl.* 21.

[If *A.* entitled to reversion after death of tenant for life, (then unmarried, but to whose first and other sons there are remainders,) sells reversion, and tenant for life dies in a month, the conveyance shall not be set aside if no fraud. *Nicholls v. Gould*, *T.* 1752, 2 *Ves.* 422.]

If a man for 350 *l.* gives security by mortgage of a reversion, after two lives, for 700 *l.* to be paid when the two lives fall: he shall not be relieved, tho' the lives fall within two years. *1 Ver.* 141.

But if an apprentice is turned away before the time for which he ought to serve, tho' occasioned by his negligence, the master shall refund part of the money. *R. 2 Ver.* 64.

If there is an agreement for the purchase of a house, which is consumed by fire before the conveyance of it, the purchaser shall be aided. *2 P. W.* 220.

Vide ante, (2 C 9.)

(2 T 14.) *When a surprise or a small mistake is alleged.*] So, a conveyance shall not be avoided, because it was made or executed by surprise; as, that it was not read by the party, or to him; except where it otherwise appears to be contrary to his intention. *R. Ca. Ch.* 56. 59. 76.

If there are many misrecitals. *3 Ca. Ch.* 56. 59. 76.

If the counsel was negligent or unskilful. *Ibid.* 56. 76.

If there was no counterpart. *Ibid.* 83.

Or, the trustees mentioned in the deed have no notice of it. *Ibid.*

If a recital is repugnant to the deed. *Per Holt Ch. J.* *3 Ca. Ch.* 101.

Or, any part material to that which is immaterial. *3 Ca. Ch.* 101.
(2 T 15.)

(2 T 15.) *After a long acquiescence.*] So, it shall not be avoided after twenty years, upon pretence that the person who conveyed was *non compos.* 1 Ch. R. 40.

(2 T 16.) *At the request of him who has only a voluntary conveyance.*] So, it shall not be avoided by him, who claims by a subsequent voluntary settlement, tho' the first conveyance was also voluntary. *Vide ante*, (2 C 8.—2 T 9.)

As, if the manor of *L.* is settled to pay 100 *l.* per ann. to a younger son, and the residue to the elder; and afterwards the father, having the settlement in his custody, settles the same manor upon the younger son and his first and other sons in tail, and settles lands of greater value upon his eldest son; equity will not avoid the prior settlement of the manor. R. 2 Ver. 475.

If *A.*, having by a voluntary settlement given an estate to *B.*, without a power of revocation, afterwards devises it to *D.*, the devisee shall not avoid the prior settlement; for he also claims by a voluntary act. *Eq. Abr.* 23. 1 Ver. 100. *Vide ante*, (2 T 9.)

[A voluntary deed, without power of revocation, formally executed, tho' informal in several parts, kept by the person, but never cancelled, shall not be set aside by a subsequent will. *Boughton v. Boughton*, M. 1739, 1 *Atkyns*, 625.]

So, if *A.* upon his marriage makes an extravagant and unreasonable settlement, if no circumvention or incapacity appears, it shall not be avoided by those who claim by a subsequent marriage settlement. *Semb. Eq. Ca.* 80.

(2 V) Copyhold.

SO, a bill lies for the severance of copyhold and freehold lands intermixed.

[The expences of a commission to separate freehold and copyhold lands, shall be borne by both parties equally, tho' their interests are of different values. *Norris v. Leneve*, P. 1744, 3 *Atkyns*, 82.]

So, to ascertain the customs of a manor. Ch. R. 114.

So, to assign timber to a copyholder, estovers, &c.

So, for the surrender of a copyhold, pursuant to an agreement with a purchaser, where the copyholder refuses to perform, or dies before performance.

Tho' it be a copyhold for lives, as well as in fee, where the copyholder hath the sole power to surrender, tho' by his death it vests by custom in another nominee. 1 Ch. R. 274.

So, to supply a surrender for payment of debts, or provision for a wife or younger children. 2 P. W. 490. *Vide Copyhold*, (P 2.)

[If one by his will charges all his worldly estate with his debts, and dies seised of copyhold, which he particularly devises, it shall be applied *pari passu* with the freehold, tho' there is no surrender to the use of the will. *Harris v. Ingledew*, H. 1730, 3 P. W. 91. *Vide* 1 *Brown*, 273, 274.]

[If a man devises all his estate to his son, subject to payment of debts, and has only copyhold, the defect of surrender shall be supplied, that something may pass. *Itbell v. Beane*, H. 1748, 1 *Ves.* 215.]

[So, tho' there be freeholds descended, and specifically devised. 2 *Brown*, 325.]

[The court will supply the defect of a surrender of estate devised in favour of a younger son, tho' some other provision had been made for him, and tho' this was only a remainder after estates for life and in tail, and tho' the heir at law had surrendered to the use of his will and devised to his mother. *Cook v. Arnham*, T. 8 G. 2. C. T. T. 35. 3 P. W. 283.]

[If A. devises all his freehold and copyhold lands in S. and M. to his wife, her heirs, &c. being assured she will leave them to such children as deserve them, and she devises all her freehold and copyhold lands, except the copyhold in H., to her daughter, and devises the copyhold in H. to her son, and intends surrendring, but dies without it, and another copyhold descends to the son; the court will establish the wills, and supply a surrender. *Macey v. Shurmer*, M. 1739, 1 Atkyns, 389.]

[A. having several copyholds, some surrendered to the use of his will, others not, one only a trust-estate, the other in his own name; he devises all his copyholds to B. his grandson, his heirs, &c. and devises several legacies to his eldest son, all the copyholds pass; for the eldest son claiming under the will must admit the whole. *Allen v. Poulton*, M. 1748, 1 Vesey, 121.]

[But if a man devises his real estate to be sold to pay debts and legacies, and subject thereto devises all his personal estate to his sister, whom he makes executor; the court will not supply the defect of a surrender of copyhold, if the other estates are sufficient. *Mallabar v. Mallabar*, P. 8 G. 2. C. T. T. 78.]

[If A. having freehold, but no copyhold lands settled, devises all his lands unsettled, and all his goods and chattels, to his wife for life, then to his younger children as she thinks fit, and dies, leaving freehold, and also copyhold unsettled, and not surrendered to the use of his will; the copyhold does not pass by the will. *Hawkins v. Leigh*, M. 1737, 1 Atkyns, 387.]

[Copyhold lands surrendered to the use of the will, pass by the general words of all messuages, lands, tenements, and hereditaments, tho' testator has freehold, especially if it appears by the will that he intended that all his estate shall pass. *Goodwyn v. Goodwyn*, H. 1748, 1 Vesey, 226.]

[If A. devises copyhold, among other estates, to B. his heir at law for life, with remainders over to C.; B. gets the estate enfranchised, calling himself executor and devisee of A., and afterwards by conveyance reciting the enfranchisement, creates a term to raise money to pay debts, the residue to C., the court-rolls are burnt, so it does not appear whether there was a surrender to the use of A.'s will; but on the circumstances it shall be presumed, and the land go to C. by the will of A. *Cookes v. Hellier*, P. 1749, 1 Ves. 234.]

So, a surrender is not necessary, where A. has only the trust of a copyhold in tail. R. 2 Ver. 585.

[A devise of the equity of redemption of a copyhold, to which the mortgagee is admitted, is good, tho' there is no surrender to the use of the will. *King v. King*, T. 1735, 3 P. W. 358.]

[If a man surrenders to the use of his will, a will unattested shall direct the uses, notwithstanding the statute of frauds, which extends not to customary estates. *Tuffnel v. Page*, P. 1740, 2 Atkyns, 37.]

[Where

[Where the legal estate is in trustees, copyhold lands shall pass by the will of the *cestui que trust*, without surrender, and tho' the will be not attested. *Tuffnel v. Page*, P. 1740, 2 *Atkyns*, 37.]

[If a real estate, part free and part copyhold, originally the inheritance of the wife, is settled in trustees for husband and wife, and the survivor, and the heirs of their two bodies, remainder to the husband in fee, and the husband by his will gives all his messuages, lands, tenements, and hereditaments in H., and all other his real estate to the same trustees for a term, and then gives all the premises unto his wife for life, without waste, the copyhold passes without surrender; for as a surrender must be by the person who has the legal estate, where one who has not the legal estate has the beneficial interest, it may pass by a will as other lands; and the testator's intention appears here. *Without waste*, is surplusage as to the copyhold. *Car v. Ellison*, P. 1744, 3 *Atkyns*, 73.]

[If a man surrenders copyhold to the use of his will, and signs the two first sheets of his will, consisting of eleven, and no more, and no witnesses to it, this is a good appointment to charitable uses, under stat. 43 *Eliz.* of charitable uses. *Attorney-General v. Sawtell*, H. 1742, 2 *Atkyns*, 497.]

So, if a surrender is not presented in the time required by the custom, it shall be aided in equity. 2 *Ver.* 564. 609. *Eq. Abr.* 122. *Vide Copyhold*, (P. 2.)

Tho' the surrenderor afterwards becomes a bankrupt, it shall be aided against the creditors of the bankrupt. R. 2 *Ver.* 565. *Eq. Abr.* 312. *Eq. R.* 14.

So, it shall be aided against a purchaser with notice. R. 2 *Ver.* 609.

So, if a mortgage is made of lands, part freehold and part copyhold, and the mortgagor dies before a surrender made; the heir shall be decreed to surrender the copyhold. R. *Ch. R.* 272. 331.

[If a man has two copyhold estates, one surrendered to the use of his will, the other not, both subject to a mortgage of 400*l.*, and by will says, I give all and every my freehold and copyhold (having surrendered the copyhold part thereof to the use of this my will) to A. and B. for the benefit of a younger child, and directs that the copyhold part shall be subject to the payment of the 400*l.* mortgage; the unsurrendered estate shall pass, and the heir at law shall surrender to the uses of the will. *Banks v. Denshaw*, M. 1747, 3 *Atkyns*, 585. 1 *Ves.* 63.]

But where the land of the defendant is not intermixed, but lies entirely together; there shall not be a commission for severance or distinguishment.

So, if a copyhold is devised to the eldest son, being of the nature of *Borough-English*, and houses in *London* to the youngest son, but there is no surrender, and the houses before the entry of the youngest son are burnt; the defect of a surrender shall not be supplied. R. 2 *Ver.* 265.

[If A. seised of freehold, and of copyhold *Borough-English*, not surrendered to the use of his will, by will desires all his debts to be paid, makes provision for his wife and daughter, further provision for daughter after wife's death, and then all the residue real and personal, of what nature or kind soever, to his wife, her heirs, executors,

executors, &c. the copyhold does not pass. *Byas v. Byas*, H. 1750, 2 *Ves.* 164.]

[Defect of surrender shall not be supplied in favour of grandson, cousin, or natural child. *Tuder v. Anson*, T. 1754, 2 *Ves.* 582.]

[But in favour of widow, children, and creditors, it shall. *Id. ibid.*]

So, if a surrender is made upon condition to be returned, if the surrenderor recovers; and afterwards he makes a surrender of part only to the same uses, and desires to have the first again, which is refused; the first shall not be aided. *R. Eq. R.* 8.

So, if a farm is mortgaged with all the lands therewith occupied, and a copyhold is occupied with the farm, but not described in the mortgage, nor a covenant therein to make a surrender: a surrender shall not be decreed, if the farm without the copyhold is sufficient. *R. Eq. R.* 14.

So, if a surrender to the use of a will was intended, but not accepted, it shall not be aided against the heir, if he did not prevent the surrender. 1 *P. W.* 354.

If by a marriage settlement land is limited to the husband and wife for life, afterwards to the first, second, and other sons in tail male, and for default of issue male, for years to a trustee for the raising of portions for the daughters of that marriage; and there is a covenant that a copyhold estate shall be surrendered to the same uses: the copyhold shall be subject to the payment of the portions, if the freehold is not sufficient; tho' by the custom of the manor it cannot be surrendered so as that a term can be limited for default of issue male. *R. 2 Ver.* 321.

If by a marriage settlement a copyhold is agreed to be surrendered to the same uses with a freehold, and a surrender is made to different uses, the surrender shall be vacated, and the copyhold shall be subject to the same uses with the freehold. *R. Ch. R.* 254, 5.

So, if by custom of a manor the wife is entitled to her *free bench*, and a copyhold is surrendered to a trustee, in trust for the husband in fee, the wife shall be aided in equity for her *free bench*. 2 *P. W.* 644.

[If in a manor where the custom is, that whoever purchases, the lands shall go in succession, *A.* purchases for his own and two other lives, and pays all the money, and by will devises all his estate, real and personal, in possession or reversion, to his wife; she shall have the estate, tho' there was no surrender, and tho' there was other provision for her. The court will supply a surrender against an *bares factus*, tho' not against an heir of blood. *Smith v. Baker*, T. 1737, 1 *Atkyns*, 385.]

[If copyholder for life, with *free bench* to his widow, agrees to sell to his son for valuable consideration, which is paid, but he dies before actual surrender; the son is entitled to the performance, and the widow must surrender her widow's estate. *Hinton v. Hinton*, T. 1755, 2 *Ves.* 631. 638.]

So, if a quit-rent is paid for twenty years by a copyholder to the lord of the manor of *B.*; it shall be decreed to him, tho' it appears and is admitted, that this copyhold was antiently held of the manor of *C.*; for a grant of the freehold of this copyhold shall be presumed. *R. 2 Ver.* 517. [The

[The court will decree payment of a quit-rent, tho' there was a remedy at law, and the bill improper and vexatious, rather than dismiss it; for plaintiff would then sue at law, to the farther oppression of defendant. *Holder v. Chambury*, P. 1734, 3 P. W. 156.]

So, Chancery will relieve against a forfeiture by waste not designed, neglect of suit, &c. *Vide Copyhold*, (M 3.)

Or, against other involuntary forfeiture. *Vide Copyhold*, (P 2.)

[Chancery will not relieve against a voluntary forfeiture. *Semb. Peachy v. D. of Somerset*, T. 7 G. Str. 447.]

[A bill lies not for a lord of a manor to hold a down discharged of defendant's claim of common. *Holder v. Chambury*, P. 1734, 3 P. W. 156.]

[If father purchase's copyhold land in his son's name, aged eighteen, and the father continues in possession till his death; this shall be considered as an advancement for the son, and not a trust for the father. *Taylor v. Taylor*, T. 1737, 1 Atkyns, 386]

[If the son devise these lands to the child his wife was enfeint with, and on its not being born alive, or dying, to his wife, and it appears she was not with child; yet she shall have them, and the court will supply the want of surrender. *Ibid.*]

[A bill lies not for a lord of a manor to compel copyholders to come in and be admitted tenants. *Clayton v. Cookes*, M. 1742, 2 Atkyns, 449.]

[No costs on application to put a party to his election. 2 Vef. jun. 11.]

[Nor, against a party making a demand of the payment of which there is only presumption. 2 Vef. jun. 15.]

[Nor, against a trustee on slight grounds. 2 Vef. jun. 36.]

[But a bankrupt shall be liable to costs for misconduct. 2 Vef. jun. 41.]

[Bill filed by legatee of testator alleged in the answer to have died insolvent: account decreed, reserving the consideration of costs, which generally in the case of a legacy are decreed immediately. 2 Vef. jun. 58.]

[Bill filed after very long delay against representatives of parties, who had also been guilty of laches, dismissed without costs; it not being clear that the plaintiff's demands had been satisfied, and there being no pretence of testator's insolvency. *Hervy v. Dinwoody*, 2 Vef. jun. 94. 4 Bro. C. C. 257. S. C.]

[Plaintiff having become bankrupt after filing the bill, not bound to give security for costs. *Anon. Anstr.* 407.]

[Bill to redeem: decree referring it to the master to take an account, and to tax costs; the report finds the mortgagee overpaid; it is too late to object to his having his costs. *Gilbert v. Golding*, *Anstr.* 442.]

[Costs refused to trustee for setting up a trust different from what it really was, but general misconduct is not a sufficient ground. 2 Vef. jun. 199.]

[Bills of costs examined after a long period, and even after payments made. 2 Vef. jun. 203.]

[After verdict on issue directed, deeds were decreed to be delivered up to the plaintiff with costs. After the master had settled the

the amount of the costs, but before report the plaintiff died; on bill of revivor by his executor and devisee, the court inclined to hold the rule not to revive for costs only, not applicable in case of the death of the party to receive them: also that the taxation should relate to the time when the amount was settled; but the demurrer was over-ruled, because it did not appear on the bill that the decree had been executed by delivering up the deeds. *Morgan v. Scudamore*, 2 *Ves. jun.* 313.]

[Where the party to pay costs dies, and they are not taxed, no revivor for them only, because a personal demand. *Ibid.* 315.]

[Bill dismissed with costs as to one defendant on his undertaking to produce all his books, otherwise not. 2 *Ves. jun.* 322.]

[Arbitrator combining shall pay costs. *Lord Lonsdale v. Littledale*, 2 *Ves. jun.* 453.]

[On a bill for partition, the costs of executing the commission, and of all necessary proceedings in the cause, must be defrayed by the parties in proportion to their interests. *Calmady v. Calmady*, 2 *Ves. jun.* 568.]

[Court of Exchequer refused to order the plaintiff to give security for costs on affidavit, that he was about to leave the kingdom. *Adams v. Colethurst*, 2 *Anstr.* 552.]

[The plaintiff, an uncertificated bankrupt, not being found at the place where the bill described him to reside, ordered to give a note of his place of abode, or security for the costs. *James v. Giladam*, 2 *Anstr.* 552.]

[Where a solicitor has been guilty of great delay in bringing in his bills, he shall not have the costs of the taxation, altho' less than one sixth part be taken off. *Yea v. Yea*, 2 *Anstr.* 589.]

[Costs on account of fraud. 1 *Ves. jun.* 22. 29.]

[On a second verdict for a less sum than the first, the last sum recovered only, and the costs of the last trial are to be paid to the defendant in equity, out of money in court on an injunction to stay execution on the first; the costs of which are to be returned to the plaintiff. *Waddle v. Johnson*, 1 *Ves. jun.* 30.]

[No costs to any party claiming under a contract not meritorious, tho' recovered upon at law; not even to a trustee. *Colman v. Sarrel*, 1 *Ves. jun.* 55.]

[After verdict on an issue found against the legitimacy of a person claiming a legacy as legitimate; costs refused against him, as he had always borne the name of the family and been received in it. *Forbes v. Taylor*, 1 *Ves. jun.* 99.]

[Bill dismissed with costs even against a plaintiff who was made so without his authority; but his whole expence, and also the whole expence of the defendant's above the costs taxed, ordered to be paid by the solicitor. *Dundas v. Dutens*, 1 *Ves. jun.* 196.]

[Costs to trustees, but none for or against heir at law, who raised a point and failed. Costs to trustees, and executors brought into court, tho' they made a claim and failed, being merely by way of submission. 1 *Ves. jun.* 205.]

[Bill amended after answer, costs must be paid for that, then it is considered as an original bill. 1 *Ves. jun.* 210.]

[Cross bill being on a mere legal title dismissed with costs, tho' the original bill was dismissed. 1 *Ves. jun.* 213.] [Costs

[Costs given, and the fund being in court ordered to remain till the account; the costs to come out of the balance (if any) due to the party, as far as it would go. *1 Ves. jun. 221.*]

[Costs of course out of the fund to agents' receivers, and trustees, who have accounted fairly, and paid money into court. Costs cannot be given to a college individually, nor as a corporation, unless proved so. *1 Ves. jun. 246.*]

[Costs of course against executors, who are decreed to pay interest on account of a breach of trust. *Seers v. Hind, 1 Ves. jun. 294.*]

[Costs to committee of lunatic refused, because he had not passed his accounts regularly, tho' no fraud. *Ex parte Clarke, 1 Ves. jun. 296.*]

[Bill being dismissed without costs, as a hard case, parties made trustees without their knowledge, and as such being necessary parties to the bill, held not entitled to costs against plaintiff, but left to their remedy against their principal: otherwise perhaps, if plaintiff had prevailed, because then those costs might have been given over against other defendants. *Brodie v. St. Paul, 1 Ves. jun. 334.*]

[On interpleading bill no costs among defendants; costs to plaintiff. *Dowson v. Hardcastle, 1 Ves. jun. 368.*]

[Costs as between attorney and client against parties to a fraudulent bankruptcy, except those who discovered and gave evidence. *Ex parte Thorp, 1 Ves. jun. 394.*]

[To entitle defendant to security for costs, plaintiff must appear to be resident abroad; then it is of course. *Green v. Charnock, 1 Ves. jun. 396.*]

[Plaintiff can in no case dismiss his bill without costs: with costs it is of course; but after motion to dismiss without costs refused, consent is necessary. *Dixon v. Parke, 1 Ves. jun. 402.*]

[Rule that plaintiff in a bill for discovery shall pay costs in all cases too widely stated; he ought only where he files a bill in the first instance, not where compelled to it by defendant's refusal. *1 Ves. jun. 423.*]

[Costs of all parties out of the estate, and being relations, as between attorney and client. *1 Ves. jun. 475.*]

[Where a cause is heard on bill and answer only, 40 s. costs dismissing the bill, unless on a special case. *Bayley v. The Corporation of Leominster, 1 Ves. jun. 476. 3 Bro. 529. S. C.*]

[On a bill for discovery, commission to examine witnesses, and an injunction, plaintiffs in equity, tho' they obtained a verdict at law, held liable to the costs of the discovery and injunction, but both parties having had the benefit of the commission, each to pay his own costs in respect to that. *The London Assurance Company v. Hankey, 1 Anstr. 9.*]

[Where costs in equity are due from the one party, and those at law from the other, the court will not set off the costs at law against those in equity, if the solicitor in equity claims a lien on the latter. *Smith v. Brocklesby, 1 Anstr. 61.*]

[Plaintiff filed a bill in Chancery, and dismissed it after answer; he then filed another bill in the Exchequer for the same matter: the court stopped his proceedings till the costs in Chancery were paid. *Baldwyn v. Malo, 3 Anstr. 835.*]

[Costs

[Costs personally against an uncertificated bankrupt, in case of fraud and misconduct. *Lock v. Bromley, at the Rolls, 3 Ves. jun. 40.*]

[Revivor for costs only on the death of the plaintiff; tho' before the report, and tho' they were not to come out of a particular fund. *Morgan v. Scudamore, 3 Ves. jun. 195.*]

[When a testator expresses himself so ambiguously as to make it necessary to come to this court, the costs shall be paid out of his personal assets. *Jolliffe v. East, 3 Bro. C. C. 25.*]

[Each executor liable to the whole costs. *Littlehales v. Gascoyne, 3 Bro. C. C. 73.*]

[Pauper shall not dismiss his bill without costs. *Pearson v. Belfer, 3 Bro. C. C. 87.*]

[Bill of heir at law against devisee, where vexatious, dismissed with costs. *Seal v. Brownton, 3 Bro. C. C. 214.*]

(2 W) Costs.

When they shall be given, and when not.

BY the *st. 17 R. 2. 6.* the chancellor, after suggestions are found untrue, shall have power to award damages after his discretion to him, who is unduly travailed.

And therefore, if a bill is dismissed upon the hearing of the cause, the defendant shall have costs.

[But there shall not be a re-hearing or appeal for costs only, unless on very special circumstances. *1 Brown, 140.*]

[But there may be a bill of revivor for costs ordered to be paid into the bank. *Id. 438.*]

If the dismissal is general, yet costs shall be incident.

[If defendant denies all equity, and plaintiff brings cause to a hearing on bill and answer, and the bill is dismissed, plaintiff shall pay taxed costs. *Johnson v. Brown, M. 1743, 3 Atkyns, 1. Vide 1 Brown, 403.*]

[If there is a decree *nisi*, and defendant makes default, and the decree be made absolute, and the court grants re-hearing on his petition, he shall pay 10*l.* costs. *Walter v. Ruffel, in Sc. M. 1718, Bunb. 30.*]

[Plaintiff, by accepting a third answer, does not waive his costs on the second. *Brotherton v. Chancy, in Sc. H. 1718, Bunb. 34.*]

[On a third order of amendment, plaintiff shall pay taxed costs, unless it was obtained on terms, and by consent. *Anon. H. 1740, 2 Atkyns, 123.*]

If the dismissal is, when the hearing is upon bill and answer, the costs of the defendant are ascertained at 40*s.*

[If a bill brought by an administrator is dismissed on demurrer, he shall pay costs. *Frazer v. Moor, in Sc. P. 1720, Bunb. 63.*]

[If bill is amended by striking out defendant's name, he shall have costs, tho' he appeared and answered without being served with process. *Blackett v. Middleton, H. 1733, Bunb. 335.*]

So, if a bill be for relief against the penalty of a bond, and it is decreed upon payment of costs, generally; this imports costs at law, and in equity. *3 Ch. R. 5.*

[On an order to tax costs of an ejectment, when a new trial is granted

granted which plaintiff had opposed, if it is granted on clear grounds, he shall not be allowed costs for the opposition, but if granted on terms, he shall. *Hay v. Hay*, P. 1747, 3 *Atkyns*, 634.]

So, if the plaintiff hath relief from a tortious procedure in an inferior court, he shall have his costs there, and here. *Ch. R.* 473.

[Where plaintiff succeeds in his demand he shall have costs, unless circumstances arise which are an excuse for defendant. *Roberts v. Kuffin*, M. 1740, 2 *Atkyns*, 112.]

[If a woman plaintiff marries, whereby the suit abates, and the husband and wife revive; she shall have costs of the whole suit, except of the bill of revivor. 1 *Ver.* 318.]

So, every trustee shall have his costs.

And if his costs are not taxed at the whole of his expence, they shall be allowed out of the trust, upon his account. *R. 2 Ca. Ch.* 138.

[If a trustee defendant misbehaves, the court will make him pay costs, tho' costs out of the estate would be the same benefit to plaintiff. *Lloyd v. Spillet*, M. 1734, 3 *P. W.* 344.]

[If a trustee, merely to have a point relating to his private interest determined, brings the *cestuy que trust* before the court, he shall pay the whole costs. *Henley v. Philips*, T. 1730, 2 *Atkyns*, 48.]

So, if a bill is brought by an heir, to avoid the devise of his father, against a devisee, and he does not prevail, but is left to law; he shall pay costs. 1 *P. W.* 558.

[On a bill brought against the executor and the heir at law, for account of real and personal assets, the heir at law is entitled to costs, for the law throws the descent on him; the executor is not, for he may renounce. *Humphrey v. Morse*, T. 1742, 2 *Atkyns*, 408.]

[If heir at law brings bill to set aside will for insanity in testator, instead of ejectment, he shall pay costs if he fails. *Webb v. Claverdon*, M. 1742, 2 *Atkyns*, 424.]

[But if the heir is defendant, tho' he insists on fraud or insanity, and issue is directed, he shall not pay costs, and often shall be allowed them, tho' he fails. *Ibid.*]

[If heir at law only cross-examines witnesses, produced to confirm a will on a bill in *perpetuam rei memoriam*, he shall have costs; but if he examines other witnesses to encounter the will, he shall not; this is only when no relief is prayed, and the cause does not come to a hearing. *Berney v. Eyre*, T. 1746, 3 *Atkyns*, 387.]

[But where at the hearing an issue at law is directed, tho' the will is established, he shall have costs. *Ibid.*]

[But if he sets up insanity, or other disability in testator, and fails, he shall not have costs. *Ibid.*]

[The court will not decree him to pay costs, but on a very strong case, as *spoliation*, or secreting the will. *Ibid.*]

[If one witness swear an heir attempted to conceal a will, which he by his answer denies, the court will give him costs. *Ibid.*]

[But if after the heir is informed there is a will in A.'s hands, he takes out administration on the usual oath, without inquiring after A., the court will not give him costs. *Ibid.*]

So, if a legatee or creditor, not a party to the suit, comes to prove a debt

a debt or legacy before a master, he shall have costs; for it is for the ease of the estate. 2 P. W. 27.

[When costs are decreed out of an estate to be sold for benefit of creditors, plaintiff and defendant are entitled to them before the creditors are entitled to their demands. *Hare v. Rose*, T. 1753, 2 Vef. 558.]

[Mortgagor shall pay costs, tho' he has offered to pay what shall appear due, on balance of the mortgage on one hand, and an open account on the other, unless mortgagee has been vexatious. *Garforth v. Bradley*, T. 1755, 2 Vef. 675.]

So, where a solicitor carried on a cause in the name of the plaintiff, he was charged with the costs. *Ca. Ch.* 71.

So, if a cause miscarries, by the gross neglect of the attorney, or his solicitor. 1 P. W. 593.

[If an attorney draws deeds under fraudulent circumstances, he shall pay costs on their being set aside, tho' he pretends he only followed directions. *Bennet v. Wade*, T. 1742, 2 Atkyns, 324.]

[If a solicitor in a cause takes affidavits before himself, a petition founded thereon shall be dismissed, and he shall pay the costs. *Ex parte Hogan*, T. 1754, 3 Atkyns, 813.]

[If there are two defendants to a bill for tithes, and they answer and examine separately, and one makes default, the other shall pay the whole costs. *Lloyd v. Mackworth*, M. 1723, Bunb. 138. *Sed qu.*]

[On an answer reported scandalous, costs (as fees not paid) are allowed by way of damages, and satisfaction for the scandal. *Chambers v. Robinson*, P. 1724, Bunb. 164.]

[If defendant to a cross-bill, by a second answer confesses a matter, tho' he had charged the contrary in his original bill, and did not disclose it in his first answer, he shall be punished with costs. *Mallabar v. Mallabar*, P. 8 G. 2. C. T. T. 78.]

[If a bill is brought to secure a contingent interest devised over, the costs shall be paid out of testator's assets, who by his will has occasioned the difficulties. *Studholme v. Hodgson*, T. 1734, 3 P. W. 300.]

[Heir at law defendant shall have costs, tho' he insists on his title, and it goes against him. Heir at law plaintiff miscarrying shall not have costs; if his suit appears groundless, he shall pay costs. *Luxton v. Stephens*, T. 1735, 3 P. W. 373.]

[In notorious frauds, anciently the court decreed exemplary costs, but it is now refused. *Waltham v. Broughton*, T. 1740, 2 Atkyns, 43.]

[A party's having refused a fair offer of accommodation, is a reason for giving costs. *Biggleston v. Grubb*, T. 1740, 2 Atkyns, 48.]

[If plaintiff does not reply, defendant has costs only according to the course of the court; but if plaintiff desires defendant to do an act, (as to admit to a copyhold,) he shall have costs taxed. *Sutton v. Stone*, M. 1740, 2 Atkyns, 101.]

[If the exceptant to an award of commissioners of charitable uses is vexatious, this court can (and will) give costs to be taxed against him, tho' the commissioners cannot. *Aylet v. Dodd*, H. 1741, 2 Atkyns, 238.]

[The court will give costs on exceptions to a decree of charitable uses,

uses, to the exceptants where they prevail, to the respondents where they do not. *Burford v. Lenthal*, P. 1743, 2 *Atkyns*, 551.]

[If an information is brought colourably for a charity, but contrary to the real charity, the relators shall pay the costs. *Attorney-General v. Smart*, H. 1747, 1 *Vesey*, 72. *Attorney-General v. Middleton*, T. 1751, 2 *Vesey*, 327.]

But the court has power, upon the circumstances of the case, to abate or discharge damages and costs. *Ca. Ch.* 106.

And therefore, where a borrower paid money to a scrivener entrusted to make a loan of the money, without taking up the security, tho' the payment was not allowed, yet he was not charged with interest or costs. *Ca. Ch.* 94. 111.

If a loan is made to an heir, &c. upon an agreement to pay 1000*l.* for every 100 *l.* if his uncle dies without issue, in his lifetime; there shall be a decree with interest, but without costs. 2 *Ver.* 122.

If a bill of revivor is dismissed with costs, no costs of the first bill shall be given. 3 *Ch. R.* 65.

If a protestant next of kin has a decree for the profits of lands belonging to papists, he shall not have costs for a case so hard. *Eq. Ca.* 146, 7.

If a bill is brought for an account against a trustee, who answers readily and honestly, he shall pay interest for the sum due from the time of the liquidation of the account, but not costs; otherwise if he controverts the account. *Pr. Ch.* 254. *Vide Eq. Abr.* 125.

[If on bill for tithes the defendant hath made tender, before and by the answer, he saves his costs; if by the answer only, he must account, with costs. *Anon. in Sc. M.* 1718, *Bunb.* 28.]

[On a bill for tithes, defendant was admitted on motion, after answer, to pay money in lieu of tithes, and costs to that time, and plaintiff to proceed at peril of costs. But it was by consent. *Bishop of Exeter v. Trenchard*, in *Sc. T.* 1719, *Bunb.* 47.]

[On a bill for thirteen sorts of tithes, plaintiff did not abridge by his replication, and proved but one sort due, yet had costs generally. *N. B.* This was on debate. *Smith v. Morgan*, H. 1733, *Bunb.* 335. But the practice in the Exchequer now is to tax costs on both sides.]

If a defendant claims 800*l.* to be due, and there is only 130*l.* due upon account, tho' he has a decree, he shall not have costs. 1 *P. W.* 377.

So, where the plaintiff has probable cause, tho' the bill was dismissed, he shall not pay costs. 2 *Ca. Ch.* 10.

So, if a bill of revivor is brought against the heir and executor, costs shall be given only for the proceedings upon the bill of revivor. 1 *Ver.* 318.

[If plaintiff revive against an executor for the duty as well as the costs, defendant shall pay costs; but if plaintiff revives only for the costs not settled in testator's life, defendant shall not pay costs. *Dela-val v. Blackett*, in *Sc. T.* 1719, *Bunb.* 45.]

If a defendant does not demur, where he might have an advantage upon a demurrer, he shall not have costs. 1 *Ver.* 283.

[If on allowing demurrer defendant levies the 5*l.* costs, and the order is afterwards reversed, the costs shall be returned to plaintiff. *Oates v. Chapman*, T. 1750, 1 *Vesey*, 542. 2 *Vesey*, 100.]

If a bill in the nature of an *interpleader* is exhibited; the plaintiff usually has costs of the defendant, who is in fault. *Ch. R.* 257, 8.

If a bill for foreclosure is dismissed, where the mortgage was by husband and wife without a fine, it shall be without costs. *2 P. W.* 128.

[Tho' bill brought by husband, for relief against a security given by his wife just before marriage, and concealed from him, be dismissed, yet costs shall be excused, unless the concealment was at wife's request. *Blanchet v. Foster, P.* 1751, *2 Vef.* 264.]

So, the court does not usually give damages or costs in cases where none are given at law; as, upon a bill of review; for if a judgment at law is reversed by error, restitution only is granted. *1 Ch. R.* 231. *3 Ch. R.* 15.

[If there has been no demand of rent for thirty years, the defendant shall not pay costs in equity, tho' he must at law. *Anon. M.* 1737, *2 Atkyns*, 14.]

[So, an executor, trustee, &c. does not usually pay costs but out of the trust. *Semb. Ch. R.* 30.

If *A.* be aided against an executor upon a bond to indemnify, the executor shall not pay costs; for he shall not have allowance of them upon *plene administravit*. *R. Hard.* 165.

If *A.* files a bill against executors for a bond to be cancelled, being satisfied; and it appears satisfied within the act of oblivion; the executors do not pay costs: for their plea was in discharge, and *tantamount* to a demand by them, as plaintiffs at law. *R. Hard.* 378.

[The executor of an executor shall be excused costs, if the estates of the two testators were so blended that he could not tell whether there were assets, tho' it afterwards appears that they were. *Sandys v. Watson, M.* 1740, *2 Atkyns*, 80.]

[Executors and administrators, tho' they do not pay costs on bill brought for an account of assets, yet are not allowed them, for they are supposed to take credit on the account for them. *Humphreys v. Moore, M.* 1740, *2 Atkyns*, 108.]

[An executor guilty of a fraud shall pay costs, tho' the testator has directed they shall be allowed costs out of the estate. *Hide v. Haywood, H.* 1740, *2 Atkyns*, 126.]

[An administrator shall not be allowed costs at all events. *Wilkins v. Hunt, H.* 1740, *2 Atkyns*, 151.]

A release of costs by the plaintiff to one of the defendants is a discharge to all; except where the defendant to whom the release is made, never was served *ad aud. judicium*, but was inserted by mistake. *R. Hard.* 183.

Yet the award of costs for or against the plaintiff or the defendant shall never be cause for an appeal, where the merits of the cause are against the appellant. *Ca. Parl.* 16.

[If costs affect the merits of the case, as if justice is on defendant's side who is a fair incumbrancer, and he is not allowed them by master of the rolls, he may appeal for them only. *Owen v. Griffith, T.* 1749, *1 Vesey*, 250.]

[Costs shall not be paid for not moving according to notice. *Tarrant v. Trevoit, in Sc. M.* 1721, *Bunb.* 86.]

[But if four notices have been given, they shall not move on the fourth without paying costs for the three first. *D. ibid.*]

[If

[If costs are reserved by the first decree, and no notice taken of them when the report is confirmed, and on appeal to the lords they order the deputy to vary the account in an article, and confirm the decree, and all other matters in it, the court will not give costs. *Crosley v. Shadforth*, H. 1727, *Bunb.* 245.]

[If infant plaintiff, or his *prochein amy*, dies after the bill dismissed, and before costs taxed, they are lost. *Morgan v. Crompton*, M. 1733, *Bunb.* 332.]

[If *prochein amy* carries on suit for an infant, with approbation of the court, and the bill is dismissed with costs, he shall be allowed the costs out of the infant's estate. *Taner v. Iwe*, T. 1752, 2 *Vesey*, 466.]

[The court will postpone the consideration of costs till after the report, to accelerate a decree, even where there is ground to decree costs at the hearing. *Scarborough v. Barton*, M. 1740, 2 *Atkyns*, 111.]

[Where defendant gives unnecessary trouble in carrying a decree into execution, plaintiff may apply for costs. *Ibid.*]

[The representative of one who has obtained an order to tax a bill, on undertaking to pay, cannot revive it but on like undertaking. *Murphy v. Balderston*, M. 1740, 2 *Atkyns*, 114.]

[To bring a defendant into contempt on an order of taxation, you must leave at his house a copy of the execution of the order, and the report of the sum. *Ibid.*]

[If plaintiff's bill be dismissed with costs, (as praying only a discovery,) and he recovers judgment at law against defendant, who lies in custody, and takes out attachment against plaintiff for the costs here, the court will let him set off the costs at law against them. *Semb. Gurish v. Donovan*, P. 1741, 2 *Atkyns*, 166.]

[The court on motion will lay their hands on costs taxed here for one of the parties, towards satisfying a debt due from him to the other on a judgment at law. *Sheregold v. Brewster*, in Sc. M. 1718, *Bunb.* 29.]

[If plaintiff brings bill to perpetuate testimony, and has examined and had the fruit of the bill, neither plaintiff nor defendant shall have costs. *Codrington v. England*, P. 1741, 2 *Atkyns*, 167.]

[But if plaintiff is forced into court by a multiplicity of actions, on a custom which might have been tried by one, and the custom is found for the plaintiff, he shall have costs. *Ibid.*]

[On a petition suggesting the poverty of plaintiff, the court will order the costs decreed to be taxed and paid immediately, to enable plaintiff to go on with the cause. *Jones v. Coxeter*, T. 1742, 2 *Atkyns*, 400.]

[If a witness demurs, and it is over-ruled, there cannot be a *sub-pena* for costs, but the court will give them by order. *Vaillant v. Dedemede*, P. 1743, 2 *Atkyns*, 592.]

[The court may give costs on particular circumstances, tho' the master has reported for the other party. *Anon.* T. 1744, 3 *Atkyns*, 235.]

[If the master reports proceedings under a commission for examination irregular, and the court thinking them regular, allows the exception; or if the master reports an answer insufficient, and the court thinking it sufficient, allows the exception, yet the party succeeding shall not have costs, for the proceeding does not appear vexatious. *Ibid.*]

[If plaintiff obtains an order to amend, on a suggestion that the cause is at issue *only*, whereas it is also in the paper, it shall be discharged with 20*s.* costs. *Harding v. Cox, M. 1747, 3 Atkyns, 583.*]

[On paying the costs of the day, a cause in the paper may be put off till next term, that plaintiff may amend. *Ibid.*]

[If costs are decreed to all parties out of a real estate, and one dies before they are taxed, they shall be taxed and paid to the heir at law. *Blower v. Morrets, P. 1754, 3 Atkyns, 772.*]

[If an executor is decreed to pay costs out of assets, and plaintiff dies, the bill may be revived for *costs only*; for the decree is not *in personam*. *Ibid.*]

[So, if the executor dies, plaintiff may revive against the representative of testator, and pursue the assets. *Ibid.*]

[If defendant is allowed his costs on the original bill, and his cross-bill is dismissed with costs, and plaintiff dies before taxation, defendant may revive. *Kemp v. Mackrell, T. 1754, 3 Atkyns, 812. 2 Ves. 579.*]

[If plaintiff is beyond sea, defendant may apply for security to answer costs; if it appears on the bill, or defendant knew it, it must be before answer, or praying time to answer; otherwise at any time in the course of the cause. *Meliorucchy v. Meliorucchy, T. 1750, 2 Ves. 24.*]

[Where plaintiff living abroad applies for a commission to examine, which is likely to prove expensive, the court will require security for extraordinary costs. *Gage v. Lady Stafford, T. 1754, 2 Ves. 556.*]

[If bill is dismissed with costs, and they are taxed, and plaintiff in custody for contempt in non-payment, and defendant dies, if his representatives do not revive in a reasonable time, plaintiff shall be discharged. *White v. Haywood, T. 1752, 2 Ves. 461.*]

[If costs are decreed out of assets, and before they are taxed suit abates by plaintiff's marriage, it may be revived; for it is an executory decree, and if assets are not admitted an account must be taken. *Johnson v. Peek, T. 1752, 2 Ves. 465.*]

[On an assignment of dower, by commissioners, the dowress shall have no costs, unless other questions be raised in which the party is litigious. *1 Brown, 134.*]

[When the material issue has been found for the party setting down the cause for further directions, he shall have the costs of the trial at law. *1 Brown, 425.*]

[If the plaintiff resides abroad, the defendant may have security for costs; but the application for that purpose must be before answer, on motion for time. *2 Brown, 609.*]

[Where the defendant has destroyed the subject of the suit, and absconded, security shall be found on the part of the defendant for the costs, otherwise the plaintiff's bill may be dismissed without costs. *2 Brown, 186.*]

[*A.*, underlessee of tithes, covenants for himself, his executors, administrators, and assigns, with *B.* the owner of land, for certain collateral considerations, to accept a reasonable composition for the tithes thereof, not exceeding 3*s.* 6*d.* an acre, during twelve years; but that in case of non-payment half-yearly, the tithes should be taken in kind. *A.* makes an underlease to *C.*, who nominally underlets to *D.*, who, in fact, is trustee for *C.*; *C.*, in *D.*'s name, files a bill against *E.*, *B.*'s tenant,

tenant, for an account of the tithes, which was decreed accordingly. C. not an *assign* within the meaning of the covenant, nor can it bind the tithes in the hands of the plaintiff as if it had been contained in the original lease. *Brewer v. HM, Anstr. 413.*]

[Objection that C., as *cestuy que trust*, should have been made a party as well as A. and B., since, if plaintiff succeeded, defendant would have a remedy against B., and B. against A.; over-ruled. *Ibid.*]

[A covenant is satisfied by suffering property to go, so as to produce the same effect; thus lands suffered to descend are a satisfaction of a covenant to purchase. 2 *Ves. jun. 356.*]

[So, where there is a covenant to leave a sum of money, which is not done, but personally is permitted to descend, so that an equal or greater sum would go according to the covenant; that is a performance. 2 *Ves. jun. 464.*]

[Lease deposited to secure a debt; depositary decreed to perform the covenants, and to take an assignment, paying the costs of it, and that he could not abandon, because being entitled to a legal conveyance, equity will consider him as having it. *Lucas v. Comerford, 1 Ves. jun. 235. 3 Bro. Ch. Ca. 166. S. C.*]

[Lessor for lives under covenant to renew, on expiration of one, not bound, if no application till two drop. *Bayley v. the Corporation of Leominster, 1 Ves. jun. 476. 3 Bro. C. C. 529. S. C.*]

[Covenant to set apart, and pay annual profits of land, is in equity a lien on the land against the covenantor, and claimants under him with notice. *Legard v. Hodges, 1 Ves. jun. 477. 3 Bro. C. C. 531. 4 Bro. C. C. 421. S. C.*]

[Where a father covenants, on his daughter's marriage to leave her at his death an equal share of his personalty, with his son, a gift to the son of his property in the funds, (which arose principally from a subsequent sale of his real estates,) reserving the dividends for his own life, is not a breach of the articles. *Jones v. Martin, 3 Anstr. 882.*]

[Right of renewal under a covenant forfeited by the *laches* of the tenant. *Baynham v. Guy's Hospital, at the Rolls, 3 Ves. jun. 295.*]

[The court leans against a construction for perpetual renewal, unless clearly intended. *Ibid.*]

[Construction of covenants the same in equity as at law; but equity will relieve against a strict performance on equitable circumstances, and no wilful default. *Eaton v. Lyon, at the Rolls, 3 Ves. jun. 692.*]

[Covenant not to assign without licence does not come within a contract to grant a lease with the usual covenants. *Henderson v. Hay, 3 Bro. C. C. 632.*]

[Lease for 21 years at 1*l.* rent, with covenant to tenants to renew from 21 years to 21 years (to make up 99 years). At the expiration of the first term, there being an arrear of rent due, and no application for renewal, lessor brought an ejectment, and obtained judgment and possession; bill filed for a renewal, (accounting for the delay,) on payment of the arrear and interest, it was decreed. *Rawstorne v. Bentley, at the Rolls, 4 Bro. C. C. 415.*]

[Father being tenant for life, and son tenant in tail in remainder of an estate, a settlement was made, wherein was a power for the son, when in possession, to make a jointure. Father and son enter into a general covenant, (without reciting or referring to the power,) that

that the son within 12 months shall make a jointure on a then-intended wife: the marriage takes effect; the father dies within 12 months; the son takes possession, and dies without making any settlement: the estate is bound in the hands of the remainder-man. *Jackson v. Jackson, at the Rolls, 4 Bro. C. C. 462.*]

(2 X) Covenant.

(2 X 1) When it shall be performed.

CHancery will enforce a specific performance of a covenant; as, if a man covenants to make further assurance. *Ca. Ch. 252. Vide ante, (2 C 1.—2 M 11.) post. (3 Z 1.)*

So, if a man assigns shares in the excise of *B.*, who covenants to indemnify; the court will enforce the performance. *Eq. Abr. 17.*

So, if there is a covenant for further assurance, and the vendor, who at the time of the covenant had a defective title, afterwards purchases a good title; he shall be decreed to convey. *Ca. Ch. 274.*

So, if *A.*, *B.*, and *C.* are partners, and upon the dissolution of the partnership, *A.* takes his share, and *B.* covenants to indemnify him against all damage in respect of the trade, and afterwards this covenant is broken; *A.* having money of *B.* in his hands, shall be enabled by the court to retain it. *Ca. Ch. 311, 312.*

If *A.* upon his marriage with *B.* covenants to settle his estate to their use, and afterwards upon the issue of the marriage, and afterwards to the heirs of *A.*, and *B.* covenants in like manner: the heir of *A.* by a former *venter* shall compel the heir of *B.* to make such settlement. *R. Eq. Ca. 108. (a)*

If *A.* covenants, upon the marriage of his daughter to *B.*, to settle a third part of all the estate which he shall have from his father; he shall be compelled to do it. *R. 2 P. W. 192.*

So, if father and son covenant to make a conveyance, and the son is under age; the father shall be decreed to procure his son to convey. *R. 2 Ca. Ch. 53.*

If *A.* covenants to settle 103 *l. per ann.* for a jointure, and afterwards purchases land of that value, he shall be decreed to settle that land. *2 Ver. 97.*

Tho' he devises the land afterwards, without making the settlement, and had no other land of that value. *R. 2 Ver. 97.*

If *A.* covenants to transfer so much stock in the *East-India Company* on or before such a day; tho' the value rises before the day, he shall be obliged to transfer and account for all dividends, and pay all costs in law and equity. *2 Ver. 394.*

If *A.* covenants, in consideration of affection, and to make a reconciliation between his nephew and his father, to make a settlement of his estate upon his nephew, he shall be compelled to do it. *Eq. Abr. 16. 2 P. W. 467.*

[If *A.* tenant in fee, in consideration, &c. demises to *B.* a messuage, &c. for three lives, under rent of, &c. and *B.* covenants with *A.*, that on the death of any of the three lives he shall pay *A.* a fine

(a) Note; this case is not accurately cited; in the original it is that *Francis the cousin of A.* covenanted to settle his estate to the same uses as *A.* did, and that the heir of *Francis* was compelled to a specific performance.

of, &c. for every life added or renewed, from time to time, according to the true intent, &c.; and *A.* covenants with *B.* that he *shall and will*, (in consideration of the fine to be paid at *A. Hall*, or the place where it now stands,) *execute one or more lease or leases*, under the same rents and covenants as the present, and so to continue the renewing such lease or leases to *B.*, paying as aforesaid the fine to *A.* for every life so renewed, from time to time, according to the true intent. *B.* is entitled to renew, with covenant of renewal inserted in every renewal, *i. e.* to renew at the same fine for ever. *Furnival v. Crew*, *P.* 1744, 3 *Atkyns*, 83. See also 1 *Bro. P. C.* 522. *Cowp.* 819.]

(2 X 2.) When not.

But a covenant to make a collateral security of other land shall not be decreed. *R. Ca. Ch.* 252.

[A covenant to settle a *particular* estate, not to purchase land, sounds only in damages, and therefore a specific performance will not be decreed, but an issue will be directed to try the damages. 1 *Brown*, 368.]

A covenant for other assurance shall not be decreed *in specie*, where the agreement was with the son during the life of his father. 1 *Ver.* 271.

A covenant shall not be decreed, where there hath been an enjoyment against it for sixty years. *R. 2 Ver.* 127.

So, it shall not be decreed, where the covenant is not certain, or there is not a mutual remedy. 2 *Ver.* 416.

So, a voluntary covenant shall not be extended, or decreed beyond the letter of it. 2 *Vef.* 693.

So, a covenant to make a lease, which would be a breach of trust, shall not be decreed. *R. 2 Ver.* 411.

So, if a term is assigned by way of mortgage, the assignee not being in possession shall not be decreed to a specific performance of the covenants, tho' liable at law. *R. 2 Ver.* 275.

(2 X 3.) When it shall be avoided.

(2 X 3.) *If there was a mistake.*] If a covenant is inserted contrary to the agreement of the parties, the covenantor shall be relieved.

As, where a man sells church land in the time of rebellion, and covenants, that he is seised, where he intended to covenant only against his own act. *R. after verdict against the covenantor, Ca. Ch.* 15. *Ch. R.* 90.

Tho' his counsel had assented to the covenant, that he was seised, omitting (*lawfully*), which is of no effect. *Ca. Ch.* 16.

(2 X 4.) *If it was intended for a special purpose.*] So, if a term is created for a special purpose, and vested in trustees for the sole disposition of the wife, and a covenant is given by the husband, that it shall be at her disposal, this covenant shall be avoided, tho' there is proof by only a single witness, that the term and covenant were not generally intended to be in the power of the wife, but for a particular purpose, which was satisfied. *R. 2 Ca. Ch.* 180.

If there is a covenant for quiet enjoyment, where the estate was purchased

purchased at an under-value, and the title proves defective, the covenantor shall be relieved in equity, upon payment of the principal and interest. *R. 1 Ver. 320.*

(2 X 5.) *If it was satisfied by a collateral matter.*] So, if *A.* covenants upon the marriage of his son to settle 200 *l.* per ann. for a jointure on his wife, and afterwards to the first, second, and other sons, &c. If he leaves 200 *l.* per ann. to descend to the son, it is sufficient; and he shall not be bound to purchase 200 *l.* per ann. to be settled, but the whole personal estate shall go according to the statute of distribution. *R. 2 Ver. 558. Vide post. (3 D 1.—3 Y 8, &c.)*

(2 X 6.) When there is a Remedy upon a Covenant in Equity.

[If a man covenants to make an estate in land, a suit in equity is most proper, for this court can give the thing itself; law, only damages. *Furnival v. Crew, P. 1744, 3 Atkyns, 83.*]

[If a covenant binds lands in equity, it gives the relief here against the proper person who is in possession of the land. *Ibid.*]

So, if a man covenants for himself, his executors, and assigns, and afterwards assigns to a person insolvent; the lessee shall be compelled, in equity, to pay the rent. *Vide 1 Ver. 88. 165.*

But if the lessee covenants to repair, and afterwards leases to trustees for his wife for ten years; the lessor shall not compel the wife to repair in equity, if the husband left assets. *1 Ver. 87, 8.*

If *A.* by marriage articles agree to lay out 1000 *l.* in a purchase to be settled upon himself and his wife for life, and afterwards to their issue, and then to the husband in fee; and he purchases a great house and garden for 1000 *l.*, which was conveyed to him in fee, and afterwards settled to the uses of the articles, with the assent of the father of the wife; *Chancery* will not enforce any other performance of the covenant. *R. 1 Ver. 346.*

[Where a testator meant for a valuable or meritorious consideration to create a charge, which by law he could not, equity will aid the intention, and even supply a defect, as the want of a surrender; but the intent must be clear. *2 Ves. jun. 332.*]

[Where the general object of a devise is void, the interest of a devisee cannot be supported on an intention of personal benefit, unless it be totally separate from such object. *Grieves v. Case, 1 Ves. jun. 548.*]

Equity will not relieve against a verdict for breach of covenant, because the damages are excessive. *1 Ver. 316.*

Or, after a trial and damages given for breach of covenant. *2 Ca. Ch. 97, 8.*

(2 Y) Custom.

WHERE a man has a right by custom, or prescription, for which his remedy at law is defective; *Chancery* will give relief.

As, if *A.* alleges a right to a *tin-set*, and that by custom the defendant ought to divide his tin into eight parts, of which the plaintiff by lot is to have one, but that the defendant to defraud the plaintiff

tiff set out only one small heap, and put all the rest into another heap; the plaintiff shall have an account for his customary part. *R. 2 Ver. 483.*

So, if by prescription, the king ought to have all the inhabitants of such a vill to grind at his mill; the court of equity in the *Exchequer* will compel them so to do. *Hard. 21.*

So, if the mill of an abbey, at which all the inhabitants of the vill ought to grind, comes to the king by dissolution, tho' it was not originally the mill of the king, or within his manor. *R. Hard. 21.*

So, if there is a long enjoyment of a watercourse, it shall be decreed; for that is evidence of a right. *2 Ver. 396.*

So, *Chancery* upon a bill, will direct a trial at law of a custom or prescription, to avoid multiplicity of suits. *1 Ver. 22. 266.*

[An issue may be directed to try whether such customs as laid in bill, or any, and what custom, tho' plaintiff does not prove the custom laid. *Earl of Scarborough v. Hunter, in Sc. P. 1719, Bunb. 43.*]

(2 Z) Debt.

What makes a Man a Debtor in Equity.

IF a man lends money to *A.* upon the security of a ship, which is lost in the voyage, *A.* shall be debtor for the money, tho' there be, or be not a covenant for the payment. *R. Eq. Abr. 139.*

(3 A) Devise.

(3 A 1.) When it shall be decreed, tho' void by Law.

Chancery will enforce the performance of a will. *Vide post. (3 G 2. -3 Y 3.) Vide Legacy, post. (3 Y 3.)*

How a will shall be executed, and construed at law, *vide in Devise, (D 1, &c.—N 1, &c.)*

A devise of the equity of redemption of lands by the mortgagor, after the mortgage forfeited, ought to pursue the circumstances required by the *st. 29 Car. 2. 3. Semh. 2 Ca. Ch. 8.*

And if *A.* purchases the inheritance and takes an assignment of a term to attend upon it, and afterwards makes a devise; if the will is not sufficient to carry the inheritance, for want of the circumstances required by that statute, the term does not pass. *R. 2 Ca. Ch. 49. 55.*

If *A.* devises entailed lands to his daughter, and other lands in lieu thereof to the issue in tail; who gives a bond that the daughter shall enjoy; the daughter shall be aided against his issue, in equity. *R. 2 Ver. 233.*

So, if there was no engagement that the daughter should enjoy. *Eq. R. 15.*

If a man devises to *A.* for life, and then to his 1st, 2d, 3d, and other sons in tail, and afterwards to *B.* and *C.* to preserve the same remainders, *Chancery* will enforce a construction of the devise to the trustees to be precedent to the 1st, 2d, and other sons. *R. upon a plea to a bill brought by one who claimed under a recovery suffered by A. R. 2 Ca. Ch. 10.*

If a man articles for the purchase of land, and then devises all his

his land for the payment of debts, and afterwards the land is conveyed to him; the land shall be decreed for the payment of debts, tho' the purchase was not complete at the time of making the will, and there was no republication. *R. 2 Ca. Ch. 144.*

So, tho' no article was executed for the purchase, precedent to the will. *Per Lord Chan. 2 Ca. Ch. 144. Eq. Abr. 174.*

If *A.* devises by mistake, land which was entailed, and permits his land in fee to descend; the devisee shall be aided. *R. 2 Ver. 233.*

If a man writes a paper and keeps it with his will; tho' it does not amount to a codicil, it may be allowed to explain the intent of the testator in his will. *1 Ch. R. 268.*

If a will is torn or cancelled by a stranger, the heir shall be decreed to convey pursuant to the devise, if by pieces collected, &c. it can be known; tho' it does not appear to be cancelled with the privacy of the heir. *R. 2 Ver. 441.*

If a man devises land to *A.*, and afterwards his son, to defeat the devise, disseises his father, who dies before a re-entry; *Chancery* will decree the devise, tho' void by law. *Eq. Abr. 174. 1 Rol. 371. J. 41.*

So, if a man devises his copyhold, agreed to be purchased, and dies before admittance. *Eq. Abr. 174.*

So, if a man by circumvention is induced to make his will; it shall be avoided in his lifetime, tho' he was of sane memory. *1 Ch. R. 23.*

So, if a legacy is limited to *A.* by fraud; he shall be a trustee for some other. *Eq. Ca. 208.*

So, if *A.* by his will gives all his lands to his wife in fee, to the disinherison of all his name and blood, where it appears by circumstances that he intended to his wife only an estate for life: the will shall be avoided in equity. *1 Ch. R. 124.*

So, if *A.* gives 2000*l.* to *B.* to make him the devisee of his estate, which is done, and the notes given for the 2000*l.* are counterfeit; equity will relieve. *2 Ver. 700. 1 P. W. 288.*

If *A.* promises a testator, that he will pay an annuity to *B.*, otherwise the testator would have charged it upon his real estate, and then the testator by his will gives the annuity to *B.*, and makes *A.* his executor; *A.* shall be decreed to pay the annuity, tho' the personal assets will not extend to pay it. *R. 2 Ver. 506. Eq. Abr. 231.*

If *A.* imposes upon a testator, to devise the fee to him, where it was intended to another, equity will relieve. *2 Ver. 700. 1 P. W. 288.*

So, if a will of personal estate be gained by fraud, equity will examine the fraud. *2 P. W. 287.*

[If a bill is brought to prove a will of land, the sanity of testator must be proved, but not in case of a deed of trust to sell for payment of debts. *Harris v. Ingledew, H. 1730, 3 P. W. 91.*]

[To establish a will as to real estate, it is not sufficient to prove it executed according to the statute of frauds, the testator must be proved of sound and disposing mind. *Wallis v. Hodgison, M. 1740, 2 Atkyns, 56.*]

[To prove a will of land all the witnesses should be examined, or some account given why they are not. *Ogle v. Cooke, M. 1748, 1 Vef. 177. Townsend v. Ives, P. 21 G. 2. 1 Wilf. 216.*]

[If one witness is abroad, there must be a commission to examine him; for the same credit is not given to his hand if abroad as if dead. *Grayson v. Atkinson*, T. 1752, 2 *Ves.* 454.]

[*Chancery* will not establish a will, not proved, nor admitted by the heir of law, tho' he says he believes it, and there is no replication, but will let the cause stand over with liberty to reply. *Potter v. Potter*, T. 1749, 1 *Ves.* 274.]

[If a man devises to his son A., he shall take, tho' illegitimate, if he has acquired the name of son by reputation. *Rivers's Case*, M. 1737, 1 *Atkyns*, 410.]

(3 A 2.) When *Chancery* does not relieve; and when a Devise may be explained by Witnesses; *vid.* (T 4.)

But *Chancery* does not supply the defects in the execution of a will. *Eq. R.* 170.

[If the owner of the fee has also a term, and devises the lands, but does not execute his will before three witnesses; equity will not construe it a devise of the term. *Whitchurch v. Whitchurch*, H. 11 G. Str. 619.]

Nor, relieve against the surreptitious obtaining of a will, if it was duly executed. *R. 3 Ca. Ch.* 61. 94. 103. *Vide ante*, (2 T 12.)

Nor, against the ignorance or negligence of the counsel, who makes a will for another. *R. 3 Ca. Ch.* 120. *R. Eq. R.* 12.

[A fee mounted on a fee is void in law; and where it is a devise of a legal estate, equity cannot relieve; therefore, devise of lands to A. and his heirs for ever, and if he die without any heir, to B., is a void devise to B. *Tilbury v. Barbut*, H. 1747, 3 *Atkyns*, 617. 1 *Ves.* 89.]

Tho' there was a promise by the testator to give all to his daughter and heir, if the father of her husband made a settlement upon him. *R. 1 Ch. R.* 239.

So, it does not relieve against a revocation of a will at law. *R. Ca. Parl.* 157. *Semb. cont.* 1 *Ch. R.* 43.

Nor, does it relieve for a legacy, before the probate of a codicil by which it was given. *R. Hard.* 96.

Nor, for a legacy for the purchase of a dukedom; for honour ought not to be sold. *R. 1 Ver.* 5.

So, it does not support a devise for payment of debts, where the testator by a settlement, tho' voluntary, had divested himself of the estate. *R. 1 Ver.* 464.

So, if a will for a personal estate is obtained by manifest fraud, after probate in the spiritual court, equity will not relieve. *R. 2 Ver.* 9. 76.

Yet, a legatee under such a will shall not be aided in equity, notwithstanding the probate in the spiritual court. 2 *Ver.* 76.

[After probate of a will, a court of equity may inquire into the fairness of a residuary devise of personal estate. *Marriot v. Marriot*, in *Sc. M.* 12 G. Str. 666.]

So, a devise shall not be established in possession, against him who claims by a settlement, tho' the deed is lost. *R. 2 Ver.* 743.

So, if a man devise three tenements to his wife, in lieu of dower, with liberty to take her dower, or the devise, and afterwards sells one

one tenement; the wife shall not be aided for the value of the tenement sold; for she ought to take the estate under the will, as it was at the death of the testator or her dower. *R. 2 Ca. Ch. 24.*

So, if a man devises 1000*l.* to the child of which his wife is *enseint*, if it is a daughter, but if it is a son, then that 100*l.* *per ann.* shall be purchased and settled upon that son in tail, remainder to *B.*; the wife has a son, who dies in the lifetime of the testator, and he afterwards dies leaving his wife *enseint* of a daughter, for whom no provision was made: *B.* shall not compel the settlement of 100*l.* *per ann.* upon him, for the circumstances of the case are altered. *Semb. 2 Ca. Ch. 16.*

So, if a devise is to trustees for the benefit of *B.* for her life, and if she has issue, to be settled upon her issue, and if she has no issue to the heir of *C.*, who had a son *D.*, and two daughters *E.* and *F.*, and afterwards *D.* the son of *C.* devises to *G.*, and afterwards *B.* dies without issue; the trustees shall not be directed to convey to the devisee of *D.*, for his devise was void, being only of a possibility, but to *E.* and *F.* the daughters of *C.* *Eq. Abr. 175. 3 Lev. 427, 428.*

So, if the words of a will are not effectual, they shall not be supplied by proof.

But a devise may be explained by witnesses; as, if a man devises his manor of *D.*, and he has two manors of that name; or, to his son *B.*, and he has two sons named *B.* *5 Co. 68. 2 P. W. 137.*

[Parol evidence is not admitted, except in two cases; 1st, to ascertain the person, when there are two of the same name, or the christian or surname is mistaken; 2dly, with regard to resulting trusts of personal estate. *D. per Hardwicke C. Ulrick v. Litchfield, T. 1742, 2 Atkyns, 372.*]

[If a person's name is mistaken in a devise, yet if clearly made out by averment to be the person meant, and that there can be no other to whom it can be applied, the devise to him is good. *Rivers's Case, M. 1737, 1 Atkyns, 410.*]

[Parol declarations have constantly been admitted in cases of satisfaction of legacies by advancement in testator's lifetime. *Shudal v. Jekyll, H. 1742, 2 Atkyns, 516.*]

[If a man gives his real and personal estate equally among his children, and directs his executor to lay out a sum not exceeding 300*l.* in putting out one of them apprentice, and afterwards puts him clerk in the navy-office with 200*l.*, parol evidence shall be allowed to shew that this is an ademption. *Rosewell v. Bennet, P. 1744, 3 Atkyns, 77.*]

[Parol evidence may be admitted to shew, that 500*l.* given to a daughter's husband by the father, in his lifetime, was in full of 500*l.* left her in his will. *Biggleston v. Grubb, T. 1740, 2 Atkyns, 48.*]

[If *A.* leaves 200*l.* to one executor, and 100*l.* to another, parol evidence may be admitted to prove testator's declaration before and after execution, that next of kin should have nothing, and the executors shall have the residue. *Brasbridge v. Woodroffe, M. 1740, 2 Atkyns, 68.*]

If *A.* has two children by a first husband, and four by a second, and *B.* makes her will, and gives 100*l.* to be divided among the four children of *A.*, and after several other legacies adds, I
further

further give to the children of *A.* 300*l.*, parol evidence shall be admitted to shew she meant the children of the second marriage in the first bequest, but not in the second. *Hampshire v. Pierce*, *H.* 1750, 2 *Ves.* 216.]

[Parol evidence may be admitted to shew that testator had a great affection for his wife, and intended that she, as his executrix, should have the residue. *Lake v. Lake*, *M.* 25 *G.* 2. 1 *Wils.* 313.]

If the devise is to the right heirs of his mother's side for ever, when the deviser was heir to his mother's mother; it may be proved that he intended his heir of the mother of his mother, and not of the father of his mother. *R.* 2 *P. W.* 137.

So, if a devise is of personal estate to a wife, who is made executrix, on a bill brought by the heir, that it should first be applied for payment of debts, there may be proof by witnesses, that it was intended to be exempt from debts, but it was imagined not necessary to say so. 1 *P. W.* 9. 115. *R.* 2 *P. W.* 210.

[*B.* is indebted 3000*l.* on bond to *A.*, who devises all his estate to *B.* and *C.*, and makes them executors; the bond-debt is not released; and tho' *C.* in an answer acknowledges that it was testator's intention that it should go to *B.*, tho' the attorney who drew the will proves that testator's written instructions were to that purpose, but that he told him it would be released of course by *B.*'s being executor; and that testator, still dissatisfied, took counsel's opinion, who confirmed the same, and thereon testator executed his will, persuaded the bond would be extinguished; yet this parol evidence cannot be admitted to contradict the express words of the will. *Per Talbot C.* on appeal from the Rolls; and the chancellor's decree affirmed by the lords. *Brown v. Selwyn*, *M.* 8 *G.* 2. *C. T. T.* 240.]

[Parol evidence shall not be admitted against the legal operation of a will or an implied trust, but it shall in support of law and equity. *Taylor v. Taylor*, *T.* 1737, 1 *Atkyns*, 386.]

[Parol proof shall not be admitted in the case of a devise of a guardianship. *Per King C.* *Storke v. Storke*, *T.* 1730, 3 *P. W.* 51.]

[Parol evidence of testator's intention is not allowed when there is a blank, tho' it is, to explain a nickname, or where there are two persons of the same name. *Baylis v. Attorney-General*, *H.* 1741, 2 *Atkyns*, 239.]

[The court will not add a legacy to a will on parol proof, if it concerns personal estate only; and still less if it concerns real estate. *Whitton v. Ruffel*, *T.* 1739, 1 *Atkyns*, 418.]

[If lands are given to *A.* and *B.* and their heirs, as joint-tenants, and leasehold and personal to them and their executors, with strict injunctions to testator's daughter, and heir at law, not to contest it, and a paper signed by testator gives strong intimations, it was in trust for charitable uses; and the testator had by a former will devised them to trustees for such uses, yet such parol evidence shall not be admitted to prove such intended trust, as it would break in on the statute of frauds. *Adlington v. Cann*, *T.* 1744, 3 *Atkyns*, 141.]

[Parol evidence cannot be read to shew that testator meant to use general words in a particular sense, nor to shew that he intended *A.* should, or that *B.* should not be included in the number of his relations. *Goodinge v. Goodinge*, *P.* 1749, 1 *Ves.* 231.]

[But

[But if it may be read to shew that he knew *A.*, or that he knew he had poor relations at *S.* *Goodinge v. Goodinge*, *P.* 1749, 1 *Ves.* 231.]

[Evidence of conversations with the person who drew the will, to shew that testatrix had no other real estate, rejected. *Slanden v. Slanden*, 2 *Ves. jun.* 591.]

[Parol evidence of a republication of a will inadmissible. *Cave v. Holford*, 2 *Ves. jun.* 606. *in notis.*]

[Legacy to Mrs. G., held that the master should receive evidence to prove who Mrs. G. was. *Abbot v. Massie*, 3 *Ves. jun.* 148. *Sed vid.* 3 *Bro. C. C.* 311.]

[Provision by will increased on evidence of the testator's request to the executor, and residuary legatee, and his promise; whereupon the testator refused to make a new will, and said he would leave it to the generosity of the executor. *Barrow v. Greenough*, at the *Rolls*, 3 *Ves. jun.* 152.]

[Devise of all freehold and copyhold lands, "the copyhold part whereof I have surrendered to the use of my will," subject to debts: some were surrendered, others not; held that the latter did not pass. *Wilson v. Mount*, 3 *Ves. jun.* 191.]

[Devise after payment of debts, the debts held to be charged. *Shallcross v. Finden*, at the *Rolls*, 3 *Ves. jun.* 738.]

[Testator contracts for a particular estate, but dies before the purchase is completed; afterwards from the state of his affairs, the contract is dissolved; yet the purchase money shall not sink into his personal estate, but be laid out in other lands to the same uses as he had devised the land contracted for. *Whittaker v. Whittaker*, at the *Rolls*, 4 *Bro. C. C.* 31.]

[If *A.* devises to *B.* to sell and pay debts and legacies, and to pay the rest to *C.*, and *B.* dies, and *A.* has no heirs, and the estate escheats to the crown; *Chancery* cannot decree a sale to pay, &c. but the *Exchequer*, being a court of revenue, may. *Reeve v. Attorney-General*, *M.* 1741, 2 *Atkyns*, 223.]

(3 A 3.) How it shall be construed.

(3 A 3.) *Devise for payment of debts and legacies.*] What words pass a fee, or other estate, *vide in Devise*, (N 4, &c.)—*Vide post.* (3 P 3.—4 W 14.)

[A devise of an estate for the payment of debts is not within the statute of fraudulent devises. *Semb.* 1 *Brown*, 311.]

[But if a devise for payment of debts do not provide for it in a practicable manner, it does not take the case out of the statute. 2 *Brown*, 614.]

If a man devises lands for payment of his debts and legacies, and the surplus to his heir; the personal estate shall be first applied, in aid of the heir, as well for the payment of the legacies as of debts. *R.* 29 *Car.* 2. *Ca: Ch.* 297.

Tho' the residue of the personal estate is given to the executor. *D.* 2 *Vent.* 349. *R. F. g.* 41.]

[A mere charge on the real estate, to pay debts and legacies is not sufficient to exonerate the personal estate, unless there be words to

to shew that it was the testator's intention that the personalty should not be applied. 1 *Brown*, 144.]

[If *A.* charges his real estate with payment of debts, legacies, and funerals, and gives specific legacies to his wife, and then makes her sole executrix of his will, and of all his goods, chattels, and arrears of rent, not disposed of by his will. The personal estate shall be applied in ease of the real. *Per Cur. Lucy v. Bromley*, H. 1728, *Bunb.* 260.]

[If a man bequeaths all his personal estate to his daughter, an infant of seventeen, and makes her executrix, and devises his lands, &c. in *D.* to trustees to pay debts and legacies, and the surplus to his second daughter in tail, remainder over, the personal estate shall in the first place be all applied to pay debts. *Hastlewood v. Pope*, T. 1734, 3 *P. W.* 322.]

[If a man devises thus, As to all my worldly estate, both real and personal, I dispose, &c. first all my debts shall be paid, then devises his real estate to trustees to sell such competent parts as shall be sufficient to pay his debts and legacies, and that the money to be raised by sale of his real estate shall be deemed as personal; and then gives all the rest and residue of his personal to *A.* after payment of his debts and legacies; the personal estate shall be first applied to pay the debts and legacies, tho' testator died indebted greatly above the value of his personal estate, so that *A.* takes nothing by the devise of the residuum. *Ld. Inchiquin v. Ld. O'Brien*, H. 18 G. 2. *Wilf.* 82.]

[But if *A.* devises his lands to *B.* his wife for life, chargeable with annuities and legacies, and gives her a power by sale or mortgage to raise sufficient to pay his debts; then reciting his great satisfaction that his estate had continued so long in his name and family; and his desire to perpetuate it, devises all his real estate to his nephew, &c. they taking his name and arms, and then gives his personal estate to his wife, and makes her sole executrix; she shall take it free from the debts, and it shall not be applied in aid of the real estate. *Stapleton v. Colville*, T. 9 G. 2. *C. T. T.* 202.]

[So, if a man devises all his estate in *com. L.* to be sold for payment of debts and legacies, then devises an annuity of 200 *l.* to *A.* out of his estate not otherwise by will engaged in *com. N.*, then gives *A.* several specific legacies, then gives *B.* 40 *l.* annuity out of an estate in *N.*, makes *A.* and *C.* executors, and duly executes, and a year after interlines at the end of the will, "And I give them (the executors) all my personal estate not hereinbefore devised," and re-executes; the executors shall have the personal estate discharged of debts, which shall be paid by sale of the real estate in *L.* *Walker v. Jackson*, T. 16 G. 2. *Wilf.* 24.]

[So, on a devise of real and personal estate to pay debts and legacies, the personal estate shall not be charged with the payment of the ancestor's mortgage, or a legacy charged on land. 1 *Brown*, 58.]

[Neither shall such charge make a term for payment of debts liable to a mortgage, which subsisted on an estate at the time when the testator purchased it, but the mortgaged estate shall bear its own burthen. *Id.* 454.]

[But where a man reciting himself to be seised, subject to incumbrances, of an estate which was mortgaged, devised another estate for a term of 20 years, in aid of his personal estate, to pay bond and book-debts,

debts, and by a subsequent clause to pay *all his debts*, the personal estate and the term shall exonerate the mortgaged estate. *1 Brown, 240.*

If land in *Holland*, where land is subject to debts, is devised to *A.*, and the personal estate in *England* to *B.*, the personal estate shall be first applied to the payment of the debts in *Holland*. *R. Eq. Ca. 66.*

So, if by conveyance land is settled for the payment of debts and legacies, and afterwards, for the performance of his will, the surplus to the heir, and there is no mention made in the will, how the personal estate shall be disposed of, but it is only said, that his daughters shall release all demands upon the personal estate, (they being entitled to a dividend by the custom of *York*, and being the principal legatees,) yet the personal estate shall be applied to the payment of debts and legacies in aid of the heir. *R. Ca. Ch. 297.*

So, if a man devises his land to *A.*, which was mortgaged, or otherwise subject to his debts; the personal estate shall first be applied to the discharge of the debts or mortgage, in aid of the devisee. *2 Ca. Ch. 84. R. 2 Ver. 112.*

[If a man devises copyhold lands (which are mortgaged) to *A.*, and after his debts paid, devises the residue of his real and personal estate to his son *B.*, and makes him executor, the mortgage shall be discharged out of the personal, then out of the real estate devised to the son, and then out of the profits received by him since testator's death. *King v. King, T. 1735, 3 P.W. 358.*]

So, a charge in equity shall be a debt, and paid out of the personal estate. *2 Ca. Ch. 84.*

[If a man devises lands to two trustees, and their heirs, to be sold for payment of debts, &c. and makes the trustees and a third person executor; the lands when sold are *legal*, not equitable assets. *Ld. Masbam v. Harding, T. 1734, Bunb. 339.*]

So, a debt in law or equity shall be paid out of the personal estate, tho' by the custom of *York* the wife is entitled to one moiety, and the next of kin to the other. *2 Ca. Ch. 84. 1 Ver. 36.*

So, a debt which the testator denied, shall be paid after other debts. *1 Ver. 142. 431.*

So, if there is a devise of land for payment of debts, and the personal estate to *B.*, it shall be liable to the payment of the debts. *R. 2 Ver. 183.*

[If *A.* gives all his personal estate to his three sisters, and his real estate to his four sons, chargeable with his debts, and makes his sisters executors, and dies indebted by simple contract, bond, and mortgage; the personal estate shall be first applied to pay all the debts. *Bromhall v. Wilbraham, M. 7 G. 2. C.T.T. 274.*]

If a man, reciting his intent to pay his debts, and provide for his children, settles land for the payment of portions for his children, (but nothing is said of his debts,) yet it shall be subject to the payment of debts as well as legacies. *R. Ca. Ch. 248.*

If a man devises lands in *A.* to be sold, and after his debts, legacies, and funerals paid, a moiety of the money to *B.*, and the other moiety to *C.*, and afterwards devises all his other lands to his executors, and their heirs, for the trusts contained in his will, and then orders that they convey a moiety to *B.* and the heirs of his body, with remainders over, the other moiety to *C.*, &c. If the land in *A.* is not sufficient,

cient, all the lands shall be charged to the payment of his debts and legacies.

If a surrender of a copyhold be to the use of a man's will, and by his will he says, *My debts and legacies deducted, I devise all my estate real and personal to A.*, the copyhold shall be sold for the payment of debts. 1 *Ver.* 45.

[If *A.* surrenders customary lands to *B.*, who declares a trust thereof for several persons, and for such use as *A.* shall appoint; and *A.* makes a will of his whole estate and effects, and first wills, that all his debts shall be paid, and then devises the customary in distinct parts from his other lands, the customary lands are liable to the debts. *E. Godolphin v. Penneck*, *P.* 1751, 2 *Ves.* 271.]

[If tenant in tail levies a fine, and declares the use, to pay 100 *l.* and afterwards to the prior uses, and afterwards devises the estate for the payment of debts generally; it shall be charged with all debts. *Dub. Eq. Abr.* 139.]

If a man devises that his debts shall be paid out of his real and personal estate, if the executor pays beyond the personal estate, he shall be reimbursed out of the real. 2 *Ca. Ch.* 109. 1 *Ch. R.* 134.

If *A.* devises that his debts and legacies shall be paid in the first place, and afterwards devises land; it shall be subject. *R.* 2 *Ver.* 708.

If *A.* devises lands to *B.* in tail, remainder to *C.* in fee, and afterwards gives his personal estate to *B.*, and makes him executor, the real and personal estate are subject to the debts. 1 *Ver.* 411.

So, if he devises an annuity to the eldest son, and his land in tail to the second son, and makes him executor; the land shall be charged with the annuity. *R.* 2 *Ver.* 144.

[If *A.* gives his daughter 3000 *l.* (besides 12,000 *l.* secured by his marriage-settlement) at eighteen, or marriage, and directs his trustees to raise on his lands as much as with his personal estate will pay the 3000 *l.*, but not to raise it till eighteen, or marriage, *that it may not be a debt on his personal estate*; it shall be raised out of the real estate only. *Phipps v. Annesley*, *M.* 1740, 2 *Atkyns*, 57.]

[If a man by his will wills that his estate in *L.* be sold for the payment of his debts, legacies, and funeral, and gives *A.* an annuity and several specific legacies, and appoints *A.* and *B.* (who is testator's heir at law) joint executors, and some days after adds, *And I give and devise to them all my personal estate not hereinbefore devised, and re-executes*; the personal estate passes to them as a specific legacy, and shall not be applied to exonerate the real estate. *Walker v. Jackson*, *T.* 1743, 2 *Atkyns*, 624.]

[If a man by his will desires all his debts may be paid by his executors, adding, *I mean those only of my own contracting, not those heavier debts of my family*, and gives his personal estate to his mother, and makes her executrix, desiring her to pay all his just debts exactly; and long after the mother buys in the mortgages, and the son covenants to pay the money; testator dies, mother dies, the personal estate is still exempted from both principal and interest, on these mortgages, and they are still a charge on the real. *Leman v. Newnham*, *M.* 1747, 1 *Ves.* 51.]

If a man devises land to *A.* and legacies to others, and makes *A.*

executor, and desires him to see that his will be performed: the land shall be charged with the legacies. *R. 2 Ver. 229.*

[If a man by his will first gives an estate for life to his wife, and in the latter part creates a term for years, to take place from the day of his death, in trust to raise money to discharge his debts in such manner as his wife shall direct, the term shall take place of the wife's estate for life. *Ridout v. Dowding, M. 1737, 1 Atkyns, 419.*]

So, if he says, *As to all my worldly estate, I will and devise in manner following: Imprimis, that all my debts be paid, and then devises lands, &c.* 5 G. 2. 39.

[If a will says, "As to all my worldly estate, my debts being first satisfied, I devise," &c.; the real estate is liable to the debts. *Harris v. Ingledew, H. 1730, 3 P. W. 91. Hatton v. Nichol, T. 9 G. 2. C. T. T. 110.*]

[If a man charges his land with payment of his debts, all the debts he contracts during his life will be a charge. *Brudenel v. Boughton, H. 1741, 2 Atkyns, 268.*]

[If a man duly executes a will, charging his real estate with legacies, and by a second will, not executed in form, gives general pecuniary legacies, they are equally a charge on the land. *Ibid.*]

[The words, All the debts I have contracted since 1735, must be construed, or shall contract. *Bridgeman v. Dove, M. 1744, 3 Atkyns, 201.*]

[If A., by will duly executed, gives 800*l.* to his sister B., and 400*l.* to his sister C., and all his freehold and personal estate not disposed of, after payment of debts and legacies, to his brother D., and by a second will, not duly executed, revokes all others, and gives 400*l.* to B., and 100*l.* to C., and the residue real and personal to D., the real estate is chargeable with the latter sums only. *Brudenel v. Boughton, H. 1741, 2 Atkyns, 268.*]

[If a man by will charges his real and personal estate with payment of his debts, and then devises all his real and personal to A., and makes him executor, and he pays the interest of debts to bondcreditors who never demand the principal, and he sells the real estate, the purchaser shall not be disturbed after long possession (16 years). *Elliot v. Merriman, T. 1740, 2 Atkyns, 41.*]

[If a man creates a term for payment of debts, and declares the trust of the term to be by perception of rents and profits, or by leasing or mortgaging, to raise sufficient to pay the debts, it restrains it to payment out of rents and profits, and the court will not decree a sale; otherwise, if it is a trust of the rents and profits. *Ridout v. E. Plymouth, M. 1740, 2 Atkyns, 104. Vide 1 Brown, 311.*]

[If one devises to A. and her heir all Clifton lands, he paying all debts and legacies charged on them; and after his decease to B., A. must keep down the interest, or if the principal is paid, he pays one third, and B. two-thirds. *Bridgeman v. Dove, M. 1744, 3 Atkyns, 201.*]

[If a man by will creates a particular trust out of particular lands, and subject thereto devises them over, the devisees can take no benefit but of the remainder after the whole burthen is discharged. *Powis v. Corbet, T. 1747, 3 Atk. 556.*]

[If a man by will recites that he had by a former will given his wife all his real and personal, that she is dead, therefore he now disposes of

of the same, and first orders all debts to be paid; all his real is liable by implication: but if he goes on and devises certain premises, except *A.* and *B.* to pay legacies; this destroys the implication, and the creditors are not entitled to payment out of *A.* and *B.* *Thomas v. Britnell*, T. 1751, 2 *Ves.* 313.]

[If the whole real estate is made liable to debts and legacies, the subsequent devise of a particular part of it for that purpose does not restrain it. *Ellison v. Airey*, T. 1754, 2 *Ves.* 568.]

[*A.* by will gave to his son, whom he made executor, all his real property, not specifically disposed of, subject to his debts, and to a legacy to his daughter *B.*, and also all his personal. The son devised part of the real estate to *B.* for life, remainder to her children in fee. By deed dated three months after, reciting that he was liable to her legacy by having taken on himself the execution of the will, and also reciting a former agreement to charge her legacy on a particular part of his estate, he mortgaged the part devised to her, to secure her legacy, and covenanted to pay it. By a codicil dated three months after, he expressed his apprehensions that his personal estate would be deficient, and created a trust of some real estates for all his debts, legacies, and funeral expences. Bill filed after *B.*'s death to have the mortgaged estate exonerated out of the assets in regard to *B.*'s legacy, on the ground that it had become a personal debt of the son; dismissed with costs. *Hamilton v. Worley*, 2 *Ves. jun.* 62. 4 *Bro. G. C.* 199. S. C.]

[The equity to have the real estate exonerated by personal, subsists only between the heir, or devisee, and the residuary legatee; not specific or general legatees, much less creditors. *Ibid.* 65.]

[Devise of freehold and copyhold estates surrendered to the use of the will, to trustees, and the survivor and his heirs, in trust to pay debts and legacies, an annuity to testator's son, and for other purposes; then, on the marriage of his grand-daughter, or her attaining 21, to convey to her for life, remainder to trustees to preserve, &c. remainder to her first and other sons in tail male, remainder to her daughters in tail general, remainder to such persons, for such estates, and subject to such charges and conditions as he should by any deed, or instrument attested by two or more witnesses, appoint. The next day, by an instrument in the form of a deed-poll, with two witnesses, reciting his will, and that he had reserved a power of disposing of his estate farther; he directed his trustees immediately after the death of his grand-daughter, and failure of her issue, to convey all his real estate to the first and other sons of his son in tail male, then to his daughters in tail general, then to the right heirs of the survivor of his trustees, his heirs and assigns for ever. The grand-daughter married, and died without issue; the son also died without issue, leaving one trustee surviving. No conveyance was ever made. Under the will alone the trustees were held to have a mere legal estate, and that all the equitable interest beyond the express dispositions would have resulted to the son as heir; but that the second instrument was to be considered as a codicil sufficient to pass copyhold, but not freehold; that the last limitation was a contingent remainder to the heir of the surviving trustee, and a conveyance was directed, with an insertion of trustees to support that remainder as to the copyhold; all the freehold to go to the testator's heir, and the rents and profits of the copyhold

during the life of the trustee. *Habergham v. Vincent*, 1 *Ves. jun.* 410. 2 *Ves. jun.* 204. 4 *Bro. C. C.* 353. *S. C.*]

[Devise of lands to be sold: the money produced by the sale charged with simple contract debts on testator's implied intention. *Kidney v. Couffmaker*, *Williams v. Couffmaker*, 2 *Ves. jun.* 267. Decree affirmed in *Dom. Proc.* 1797.]

[Devise subject to a term of 1000 years to *A.*, in strict settlement; remainder to *B.* in strict settlement, and after other limitations in tail, remainder on trust to be sold; the trust of the term was to raise 4000*l.*, to be applied first in the payment of debts, legacies, &c. the rents, profits, and emoluments arising, growing, or received from the real and personal to be applied to debts and legacies, and afterwards to be an aggregate fund, and attend the inheritance; the interest of the 4000 *l.* to be paid out of the rents and profits of the estates in the term; the rents and profits to accumulate till one of the devisees should attain 21, then to be paid to him: by codicil, the testator, reciting the trust to sell, bequeathed part of the produce, and gave all the residue, and all the residue of his personalty not disposed of by his will to his legatees: the residue of the money raised under the term, and of the personalty held by *M. R.* to attend the inheritance, and the interest to be payable to the tenant for life, the principal to the first tenant in tail. *Sheldon v. Barnes*, 2 *Ves. jun.* 444.]

[Devise of lands, tenements, and hereditaments, subject to a term of eleven years, in trust to receive the rents, issues, and profits of the premises that from time to time should accrue and become due, and dispose, &c.: an advowson in gross passes, and a sale of the next presentation within the term by direction, and for the benefit of the *cessuy que trust*, was established. *Earl of Albemarle v. Rogers*, 2 *Ves. jun.* 477.]

[As to the meaning of the word "profits" in such context, *vide* 2 *Ves. jun.* 481. *in notis.*]

[Testator devised all his manors, messuages, lands, tenements, tithes, and hereditaments, and all his real estate whatsoever, *except which is hereinafter mentioned and devised*, to the use of all his children successively, in strict settlement; and gave two of them annuities, which he charged on a rectory held by him under a lease for lives, which he directed to be renewed, if those children, or either of them, should be living at his death, and that their lives, or that of the survivor, should be inserted in the new lease, and the fine paid out of his personalty, part whereof he gave specifically, and directed the residue to be laid out in land to be settled to the same uses as his real estates: but afterwards, by a testamentary paper unattested, he disposed of his personal property otherwise: the heir contracted to sell the lease of the rectory, and on a case directed to *B. R.* on his bill for specific performance, the certificate was, that the lease did not pass by the will, but devolved on the heir as special occupant, and that he took the absolute interest therein *at law*. The Lord Chancellor considered the title too doubtful to be forced on a purchaser. *Sheffield v. Ld. Mulgrave*, 2 *Ves. jun.* 526.]

[Testator devised freehold estate to his brother, and his wife, for their lives, remainder to *A.* his nephew, and the heirs male of his body, and for default of such issue to *B.* in the same manner, remainder over; he gave so much of the same estate as was leasehold

to his brother and his wife for so many years of the term as they or the survivor should live; and directed, that after the decease of the survivor the leasehold premises should from time to time be held and enjoyed, and belong to the several persons in succession, who should for the time being be entitled to the freehold, so far as the rules of law would admit, and gave the same direction as to the furniture of the mansion-house. By codicil, reciting that he had devised the freehold part, after failure of issue male of *A.*, to *B.* in tail male, &c. he revoked those limitations, and after failure of issue male of *A.* devised to others, and repeated the disposition he had made of the leasehold and furniture: *A.* takes the leasehold absolutely. *Fordyce v. Ford*, 2 *Ves. jun.* 536. 4 *Bro. C. C.* 494. *S. C.*]

[Devise to the heir at law and his issue male in strict settlement; remainder in trust to be sold, and the money to be distributed among certain persons, or the survivors or survivor of them, and that the share of one should, previous to her marriage, be settled upon her for life; and after her death upon her issue; in default of issue upon her right heirs: the produce of the sale is to be considered as personal, and vests in the survivors at the death of the tenant for life, without issue male. A settlement in trust for the husband for life, then for the wife for life, then for the children, as they should appoint; in default of appointment, equally; if no children, according to their joint appointment; in default thereof to the husband, his executors, &c. is a sufficient execution of the direction in the will. *Brograve v. Winder*, 2 *Ves. jun.* 634.]

[Testator by will, duly attested, gave an annuity to his daughter charged on his real estate, in aid of his personal; by codicil not attested, he gave his real and personal estate to his mother for life; during her life the personal estate is discharged from the annuity; but it remains a charge on the real. *Buckeridge v. Ingram, at the Rolls*, 2 *Ves. jun.* 652.]

[Testator gave his personal estate to his mother for life, remainder to his children, on condition that his mother should see the fines for renewal of a lease; and the interest of a mortgage, paid, and be consulted as to the manner of raising the fines, that she might give her approbation as she might think proper; she is only to keep down the interest. *Ibid.*]

[Testator gave a legacy to his son, an estate in fee to his nephew; then several of his freehold estates, (describing them,) and a future purchase of freehold to be made with part of his personalty, and all his leaseholds to his wife for life, then to his son and his issue lawfully begotten, or to be begotten, to be divided among them as he should think fit; if he die without issue, all, as well *present*, freehold, and leasehold, as the estates to be purchased, to be sold; the produce to go over; no part of his present freehold and leasehold, or the estates to be purchased, to be sold during the lives of the wife and son; all the rest, residue, and remainder of his property whatsoever and where-soever, after payment of debts, &c. to the wife. The son held to be tenant for life, and the devise over to be good; that the word "*present*" imported no more than an opposition to what was to be bought, and did not extend to estates of testator not mentioned in the will. *Hockley v. Mawbey*, 1 *Ves. jun.* 143. 3 *Bro. Ch. Ca.* 82. *S. C.*]

[Heirs, or issue, where intended to take distributively, must take as purchasers. 2 *Ves. jun.* 149.]

[Gift to *A.* and his issue, to be divided among them as he thinks fit; the issue have an interest at all events, and *A.* has no authority except as to the proportions: if no appointment, equally. *Ibid.* 150.]

[Where to be divided among issue the proportions must not be illusory. *Ibid.*]

[Issue will extend to any remote degree, as a description of the objects of the power of *A.*, among whom he has a power of distributing as he thinks fit, but they must be all in existence during his life. *Ibid.*]

[Particular estate considered to be given for the sake of limitation over. *Ibid.* 151.]

[Devise in trust to sell for payment of debts and funeral expences, with a particular disposition of the surplus money: the personal estate not being otherwise disposed of than by the appointment of an executor who was not one of the trustees, held to be first liable to the debts, &c., especially as the produce of the sale was not sufficient for them. *Gray v. Minnethorpe*, 3 *Ves. jun.* 103.]

[Under a devise to sell, and pay debts and funeral expences, the personal estate was exempted without express words, upon the evident intention. *Burton v. Knowlton*, 3 *Ves. jun.* 107.]

[Where there is an express direction in a will, that the debts, &c., shall be paid out of the real estate, the person, to whom the personal is bequeathed, takes it exempt. *Ibid.* 111.]

[To exempt the personal estate under a devise for payment of debts, the intention must appear plainly on the will; and the court cannot look to extrinsic circumstances. *Brummel v. Prothero*, 3 *Ves. jun.* 111.]

[Tho' a general charge of debts on a devised estate will not prevent the previous application of an estate descended; yet if the devised estate is selected and appropriated to the debts, it is liable before the estate descended; but this arrangement does not bind the creditor. *Manning v. Spooner*, 3 *Ves. jun.* 114.]

[The order of application to debts: 1st, The personal estate, unless exempted expressly or by plain implication: 2dly, Estates devised for the particular purpose of paying debts: 3dly, Estates descended: 4thly, Estates devised. *Ibid.* 117.]

[A general charge of debts and legacies on all the real estates of the testator not annulled by a subsequent power to sell a particular estate only, and apply the produce to the same purpose, but held that that estate should be first applied. *Coxe v. Bassett, at the Rolls*, 3 *Ves. jun.* 155.]

[Construction of a will, and of several very inaccurate codicils on a disposition of the personal estate as to the interest, whether absolute or for life; and as to the extent, whether general or specific, and exempt from debts. *Ibid.*]

[Devise in fee and bequest of personal estate to *A.*, and in case of his death under 21, without leaving issue, to *B.* Codicil affirming the will in all respects, except by directing that *A.* should not be entitled till 25. *A.* dying between 21 and 25, without issue, *B.* held to have no title. *Scott v. Chamberlayne*, 3 *Ves. jun.* 302. Affirmed on appeal to Lord Chancellor, 3 *Ves. jun.* 491.]

[Real

[Real estates devised held liable to simple contract debts, under a direction in the beginning of the will, that debts and funeral expences should be first paid: that which descended to the heir by the failure of the devise to be first applied. *Williams v. Chitty*, 3 *Ves. jun.* 545.]

[Devise to *A.* and her heirs; but if she dies under 21, and unmarried, to *B.* and her heirs. *A.* dies in the lifetime of testator under 21, and without issue, but having been married; the heir of devisor is entitled. *Ibid.*]

[A will cannot be varied on the ground of mistake, unless the alleged mistake is clearly inconsistent with the intention on the whole will. *Mellish v. Mellish*, at the Rolls, 4 *Ves. jun.* 45.]

[Mistake in a will corrected on the clear intention appearing on the whole will. *Philips v. Chamberlaine*, at the Rolls, 4 *Ves. jun.* 51.]

[The capital of the residue passed by implication, tho' the interest and dividends only were expressly disposed of. *Ibid.*]

[Chattels directed to go as heir-looms with an estate, "as far as the rules of law and equity will permit," vest in the first tenant in tail, who comes into *esse*. *Vaughan v. Burslem*, 3 *Bro. C. C.* 101.]

[Testator (his wife being pregnant) gave his estate to trustees to apply the profits for the use of the child during infancy; and at 25 to the child in fee; but in case the child should die before 25, without issue, remainder over; the child was still-born: after which testator made a codicil, affirming his will, and died without issue. Forty-three weeks after his decease the widow was brought to bed of a son, who was found to be legitimate. Held that the son could not take the estate, but that the devisees over were to take. *Foster v. Cook*, 3 *Bro. C. C.* 347.]

[Testator also ordered the trustees to possess themselves of his estate and *substance*, and to pay debts; this held to be a charge of the debts on the real estate. *Ibid.*]

[And that the assets should be marshalled for the legatees to let them in so far as the personal estate had paid towards the debts. *Ibid.*]

[Money bequeathed to be laid out in land to be settled on the testator's nephew *A.* for life; remainder to the wife of *A.* for life, with remainders in tail to the sons and daughters of *A.* by such wife. *A.* was not married till after the death of the testator: held to extend to a second wife. *Peppin v. Bickford*, 3 *Ves. jun.* 570.]

[Money was to be laid out in land to be settled to the husband for life; remainder to raise portions for younger children; the money was afterwards invested by direction of the husband, in *South-Sea* annuities; afterwards by will he devised generally all his manors, &c. to certain uses; the money in the funds must be laid out in land. *Hickman v. Bacon*, 4 *Bro. C. C.* 333.]

[Devise of lands, not in settlement upon testator's wife, will pass the reversion of the settled lands. *Glover v. Spendlove*, 4 *Bro. C. C.* 337.]

[Devise of all the rest, residue, and remainder of estate, both real and personal, unto *A.*, to be placed at interest, until her age of 21 years, or day of marriage, and then the whole thereof, together with the interest accumulated thereon, to be paid to her to and for her use during her natural life, and from and immediately after her decease unto the heirs of her body lawfully begotten, equally to be divided

vided between them, share and share alike, and in default of such issue, or of the death of *A.* before her age of 21, or day of marriage, then unto her (testatrix's) brother, is an estate for life in *A.* *Jacobs v. Amyatt*, 3 Bro. C. C. 542.]

[An award obtained by suppression of evidence would be no bar to a bill for discovery. *Mitchell v. Harris*, 2 Ves. jun. 135. 4 Bro. C. C. 311. S. C.]

[On bill by heir at law for discovering and delivering up, or depositing title-deeds against persons in possession of them, as executors, and in possession of the premises by agreement with a tenant by the courtesy, plaintiff need not state his title *modo et formâ*, at least not without being allowed the assistance of the production. *Ford v. Peering*, 1 Ves. jun. 72.]

[When tenant for life is satisfied, and does not care about the title, but remainder-man is not, the court will take care of the deeds, and not leave them in the hands of third persons, who have no right. *Ibid.* 78.]

[On a bill for discovery, the answer of the party interested cannot be dispensed with, altho' he be an infant, and the person from whom his father purchased, has answered, and denied any knowledge of the circumstances. *Hardcastle v. Shafto*, 1 Anstr. 77.]

[Bill for tithes, praying discovery, whether the defendants had not associated together in their defence? Demurrer to the discovery allowed. *Oliver v. Haywood*, 1 Anstr. 82.]

[Bill to obtain evidence for a defence at law, which being obtained, it was held the court could not proceed to give relief, altho' the party could not, on objections of form, have the effect of the evidence at law. *Lee v. Shoulbred*, 1 Anstr. 83.]

[Bill for a discovery whether the defendant had not contributed to the expence of a suit to try a general question, between the plaintiffs and other parties. It appeared, that by the course of that suit, no general right could be decided by it. Demurrer to the bill allowed. *The Mayor, &c. of London v. Ainsley*, 1 Anstr. 158.]

[Bill stated that *A.* died about 20 years ago seised in fee of a messuage, leaving plaintiff his heir at law. The widow continued in possession till her death, and her daughter the defendant has been possessed ever since. The bill suggested that the defendant claimed under some deed or devise from the ancestor of the plaintiff, and prayed a discovery of her title. Demurrer to the bill allowed. *Mutloe v. Smith*, 3 Anstr. 709.]

[In a bill for discovery to support an action by a common informer, for money won at play, it is sufficient to state that the defendants, or some of them, for the benefit, and on account of all, played and won. *Cowan v. Philips*, 3 Anstr. 843.]

[In such a bill it is not necessary to state the nature of the action brought, it is enough to say, that an action was brought on the statute 9 Ann. to recover the money, and to shew by the facts that an action on the statute lies, *Ibid.*]

[Defendant obliged to answer as to having a share in the bank. *Ibid.*]

[A bill for discovery of the contents of a lost deed, and to have a new one executed, must be accompanied with an affidavit of the loss. *Rotham v. Dawson*, 3 Anstr. 859.]

[Bill

[Bill for discovery, whether the plaintiffs were not employed by one defendant, a peer, as solicitors, to present and prosecute a petition to the House of Commons on behalf of the other defendant, complaining of a return of a member of parliament, and praying that such other defendant might be declared duly elected; demurrer allowed on grounds of public policy, and because the discovery could have no effect, and principally, because such transaction would amount to maintenance at common law. *Wallis v. Duke of Portland*, 3 *Ves. jun.* 494. Decree affirmed in *Dom. Proc.* 1798.]

[If the bill be for discovery of matters penal at common law, or by statute, the defendant need not demur or plead, but may insist he is not liable on exceptions; but if the time for suing the penalty expires between the first and second answers, and exception is taken to the second answer for not discovering, the exception shall be allowed, and the party is bound to discover. *Williams v. Farrington*, 3 *Bro. C. C.* 38.]

(3 A 4.) *In what order they shall be paid.*] Upon a devise for payment of debts, debts upon simple contract, and upon specialty, shall be paid in proportion; for in conscience they are equally due. *R. Ca. Ch.* 32. *R. per Finch*, *Ca. Ch.* 249. *R. 2 Ca. Ch.* 54. 1 *Ver.* 64. 102. *R. Ch. R.* 196. *R. 2 Ver.* 62. *R. 2 Ver.* 763. 3 *Ch. R.* 12. *Eq. Abr.* 141. 1 *P. W.* 228.

And if there is not sufficient to pay all, the loss shall be equal. *R. Ca. Ch.* 32. *R. 2 Ca. Ch.* 54.

So, debts barred by the stat. of limitations shall be paid; for they are due in conscience, tho' the stat. has taken away the legal remedy. *Per Cowper*, 1 *Sal.* 154. *R. 2 Ver.* 141. *Eq. Abr.* 139.

So, if the interest upon a bond exceeds the penalty, and the devisee or trustee neglects payment, he shall pay interest for the penalty. 6 *Sal.* 154. *Vide post.* (4 D 1, &c.)

After a decree for payment equally, one creditor shall not be allowed to have preference by obtaining a judgment, &c. 2 *Ver.* 435. 525.

And if he takes out execution at law, the others shall have equal proportion out of the assets in equity. 2 *Ver.* 436.

If a note is given to A. for part of purchase-money, and the purchaser gives a mortgage to A. for the residue; A. shall not be preferred to the other creditors of the purchaser, for the note. 2 *Ver.* 281.

But judgments shall be satisfied before other debts; for those in their nature charge the land. *R. Ca. Ch.* 32. 1 *Ver.* 102. 3 *Ch. R.* 12. If they are not confessed after the bill exhibited. *R. 2 Ver.* 62.

So, debts fixed by bond shall be paid before damages not ascertained. *R. 2 Ver.* 272, 273.

So, debts which affect the real estate binds according to priority; as, mortgages, judgments, statutes, and recognizances. *R. in Parl.* 1705, 1 *Ver.* 525. *Eq. Abr.* 141, 2.

If the recognizance is inrolled, otherwise not. 2 *Ver.* 750.

So, judgments, according to the priority of the originals. 2 *Ch. R.* 145.

[But by *stat.* 5 *W. & M.* c. 20. s. 3. no judgment not doggetted

getted and entred according to the directions of that act, shall affect any land or tenements, as to purchasers or mortgagees, or have any preference against heirs, executors or administrators, in their administration of their ancestors', testators', or intestates' estates.]

A voluntary bond, for the benefit of a wife, shall be paid after debts upon simple contract, and before legacies. *R. temp. G. 2. 6.*

And debts shall be satisfied before legacies. *Cont. 2 Ca. Ch. 32. Acc. per Finch, Ca. Ch. 249. R. If it be by devise, and not by deed. Ca. Ch. 275. Cont. 1 Ver. 482. 2 Ver. 134. R. acc. 2 Ver. 248.*

So, if lands are devised to the executor for payment of debts, they are assets, and the debts ought to be paid according to their priority. *1 Ver. 64. Vide ante, (2 G 1.)*

[If a man devises lands to trustees to pay all his debts, and the bond-creditors recover part out of the personal estate, and then apply for the rest out of the real estate devised; they shall not come in on the land till the simple contract creditors have received thereout sufficient to make them equal with the bond-creditors, in respect of what they have received out of the personal estate. *Hastewood v. Pope, T. 1734, 3 P. W. 322.*]

[If a *cestui que trust* of a real estate makes a mortgage of it in fee, and devises the equity of redemption to his son and his heirs, subject to his debts, the bond-creditors can have no preference, as it was a mortgage of the whole inheritance. *Plunket v. Penfon, T. 1742, 2 Atkyns, 290.*]

[But if a reversion in fee was in the mortgagor, the bond-creditor would have preference. *Ibid.*]

So, in all cases where there are assets at law, tho' the creditors pray aid in equity. *R. 2 Ver. 405. 720. Eq. Abr. 141.*

So, if land is devised to an executor, to pay mortgages in the first place, then particular legacies, and afterwards to the executor in fee; if he mortgages for the payment of other debts of the testator, those mortgages, as well as the mortgages of the testator, shall be paid before the legacies. *R. 1 Ver. 69.*

But a devise, that his debts shall be paid before the legacies after mentioned, extends only to pecuniary legacies, and not to land expressly devised for the payment of particular sums. *1 Ver. 457.*

[If lands are charged with payment of debts, and part devised to A. part to B., &c. the creditors cannot be paid till the master certifies what proportion each devisee is to contribute. *Harris v. Ingledew, H. 1730, 3 P. W. 91.*]

(3 A 5.) *The surplus shall be to the heir.*] If a man devises lands for the payment of debts and legacies, and gives a legacy to his heir, the devisee has the inheritance without a trust to pay the surplus to the heir. *R. Ca. Ch. 197. 2 Ver. 247. R. cont. for the surplus shall be to the heir. 2 Ver. 425.*

[If A. by his will gives *5l.* to his brother and heir at law, and makes his wife his whole and sole heiress and executrix of all his real and personal estate, the same to sell and dispose of as she thinks proper, to pay his debts and legacies; the surplus is to the wife, and there is no resulting trust for the heir. *Rogers v. Rogers, M. 4 G. 2. C. T. T. 268. 3 P. W. 193.*]

But

But if a man devises lands for the payment of debts and legacies, without more, the surplus shall go to the heir. *R. 2 Ca. Ch. 115.*

1 Ch. R. 164. Semb. 2 Ver. 247. Vide post. (3 P 3.)

'Tho' he devises only a term for years. *R. 2 Vent. 359.*

So, if trustees raise money sufficient for the payment of debts and legacies, and do not pay them, the heir shall have the residue of the lands, and the creditors and legatees must pursue their remedy against the trustees. *R. in Parl. 1 Sal. 153.*

So, if there is a devise to trustees, but the trust cannot be proved; the trust shall be decreed for the heir. *R. 1 Ch. R. 101. R. Eq. Ca. 122.*

If the wife of the testator, being executrix, takes husband, who takes the personal estate as a portion with his wife, yet he shall account for it, for the benefit of the heir, tho' no creditor is concerned. *R. 2 Ver. 61. 569.*

If *A.* devises lands to trustees to be sold for such persons as he shall appoint, and if he does not appoint; then for *B.* if he appoints, but not to the value, the residue does not go to *B.* but to the heir. *R. 2 Ver. 571.*

If a man devises that his debts and legacies shall be paid by the trustees of his real estate, and devises to his wife, whom he makes his executrix, the residue of his personal estate; that shall be applied in the first place in aid of the real estate. *R. 2 Ver. 569. 740. Cont. 1 Lev. 203.*

Or, if the residue of the personal estate was devised to the heir. *2 Ver. 740. Eq. Ca. 129.*

[But if a man devises his real estate to trustees for payment of all debts, legacies, and funerals, then specific legacies, and then all the residue of his personal to his executors, the real estate shall first be applied, and if not sufficient, the personal. *Bicknel v. Page, M. 1740, 2 Atkyns, 79*]

(3 A 6.) If a man devises money to be paid out of the profits of land, and the profits do not amount to the sum, the land shall be sold. *D. 2 Vent. 357. 1 Ver. 256.*

[When the land shall be sold, *vide post. (4 H 5.)*]

So, if he devises, after his debts paid, 500*l.* for portions to his daughters, and to his executrix all his lands and tenements, goods and chattels. In such case, if the personal estate and the profits of the lands are not sufficient to pay debts and legacies, the executrix shall be decreed to sell the lands. *R. Ca. Ch. 179.*

So, if a devise is of portions for daughters out of land to be paid at a day fixed, and the annual profits do not amount to a sum sufficient to make the payment at the day, the trustee may sell the land. *R. Ca. Ch. 176. 240.*

[If one has a power to appoint to an unprovided child, in such manner as he shall direct, the payment of 200*l.* to be raised by trustees out of the rents and profits of an estate, and the annual profits are not sufficient, it shall be sold. *Green v. Belcher, H. 1737, 1 Atkyns, 505.*]

So, if a man devises that his debts and legacies shall be paid out of the profits of his land; the land itself may be sold for those purposes. *R. 2 Ca. Ch. 205. Eq. R. 90.*

So, if he devises lands, *except the manor of D. which I appoint for the paying of my debts*; the executors may sell the manor of D., for that is the most effectual means for the payment of debts. R. Sav. 73.

[If A. devises his copyhold estate, one-third to his wife for life, and two-thirds to his son, with a proviso, that if his personal estate, and his house and lands at W. shall not pay his debts, then his executors to raise the same out of the copyhold; this entitles them to sell the copyhold. *Bateman v. Bateman*, M. 1739, 1 *Atkyns*, 421.]

So, if he devises rents and profits to pay an annuity, and afterwards to pay debts and portions, and afterwards to other persons; if the debts and portions cannot be conveniently raised without a sale, it shall be decreed. R. 2 *Ver.* 26.

So, if he devises an estate to A. in tail, remainder to B., &c. and gives power to his executor to raise money for his heir, and to pay debts; the executor may sell. R. 2 *Ver.* 154.

So, if a sale is convenient for the heir, it shall be directed upon his suit, tho' the younger sons oppose it, as well as for the benefit of the younger sons, to whom portions are given. R. 2 *Ver.* 154. 420.

But if a man makes a voluntary settlement, upon trust to pay debts out of the profits of the land, the trustees cannot sell. 1 *Ver.* 104.

So, if he devises land for the payment of debts out of the annual profits only. 1 *Ver.* 104. *Eq. R.* 90.

[The directing a gross sum to be raised does not necessarily imply that it shall be raised at once, and in such cases the court will not direct a sale if not absolutely necessary. *Okeden v. Okeden*, M. 1738, 1 *Atkyns*, 550.]

[If a man devises the rents and profits of his plantation to trustees on certain trusts, the land shall not be sold. *Conyngham v. Conyngham*, T. 1750, 1 *Ves.* 522.]

[If a man devises, that trustees shall sell his real estate, and what arises by such sale shall go to his daughter, and her issue, and if she die without issue, then to two other daughters; the land shall be sold, and the first daughter have the money, notwithstanding the contingent interest of the others. *Ridge v. Hudson*, P. 1717, in *Sc. Bunb.* 12.]

[If a man, having a son and a daughter, devises his lands to trustees for paying funerals, debts, and legacies, then for raising maintenance for his children, and surplus rents and profits to the younger children at twenty-one, the lands to the eldest at twenty-three; the land shall be sold for payment of debts, the legacies shall be paid as the rents arise. *Baines v. Dixon*, M. 1747, 1 *Ves.* 41.]

[Estate devised on trust to be sold with all possible diligence, or in a reasonable time, considered as sold from testator's death. 1 *Ves. jun.* 367.]

[Tenant in tail of a rent-charge under a settlement being also devisee in strict settlement of the estate charged with it, put to his election. *Blake v. Bunbury*, 1 *Ves. jun.* 514.]

[A. devised all his estates whether freehold or leasehold at M., O., and I., to his widow for life, remainder to his nephew, paying 2000*l.* to the appointee of the widow, and made her executrix, and residuary

duary legatee. The estates in question were held under church leases, which the testator renewed after making the will; the widow by her will reciting the devise, and the power of appointment, "in pursuance of the said power," appointed to the plaintiffs, and devised the estates "so given her by her said husband's will, and all her legal estate and interest therein," to trustees for the nephew, upon his paying the said charge, "according to the true intent and meaning of her said late husband's will, but not before, or otherwise." Supposing the renewal of the leases to have been a legal revocation of the devise by the husband, the executrix shall not be understood to have acted through ignorance of her right to the whole, but to have designedly given effect to the intention of the husband. *Penrice v. Garmons*, 3 *Anstr.* 821.]

[Whether the renewal of the church leases revoked the devise of the husband? *Qu. Ibid.*]

[The legal estate in mortgaged premises held not to pass by a general residuary devise by the mortgagee. *Duke of Leeds v. Munday*, 3 *Ves. jun.* 348.]

[Devise to *A.* and his wife for life; and after the death of the survivor, upon trust to sell, and apply the produce to and among all and every the issue child or children of *A.* by his said wife, and their representatives equally: the fund held to belong to the children surviving the testator, but that the issue of a daughter who died in the life of *A.* were entitled as representatives against the claim of their father as administrator. *Horspool v. Watson*, 3 *Ves. jun.* 383.]

[In a devise, limitation over on the death of a person unmarried, and without issue; "unmarried," in its usual sense, meaning never having been married, "and" was construed "or," to afford a reasonable construction. *Maberly v. Strade*, 3 *Ves. jun.* 450.]

[Words of survivorship added to a tenancy in common in a will, are to be applied to the death of the testator, unless an intention to postpone the vesting be apparent. *Ibid.*]

[Leasehold property bequeathed in remainder in trust for a child *in ventre*, if a son, for life, and after his decease for such of his issue male as should be his heir at law at his death; if no such then living, for such persons as should then be the legal representatives of the testator; a son being born, and dying without issue, the limitation over was established in favour of the next of kin, according to the statute at the time of distribution. *Long v. Blackall*, 3 *Ves. jun.* 486.]

[Devise on condition of paying 500*l.* in six months, on trust to pay the interest to the devisor's wife for life, and after her death the principal, according to her appointment in writing with witnesses, whether sole or married, provided she should release her dower within six months, and in case of her marriage, without consent of the trustees, one moiety to go over: the wife, who took other interests under the will, died within the six months, not having married nor released dower; the 500*l.* held not to vest in her. *Croft v. Slee*, at the Rolls, 4 *Ves. jun.* 60.]

(3 A. 7.) *Who shall sell.* If land is devised for payment of debts and legacies, and no person named, who is to sell; the executor may sell. *Ca. Ch.* 178. 2 *Jon.* 26. *R. Dal.* 106. *Dy.* 3*N. b.*

So, if it is devised to be sold, and the money to be distributed. *R. Ca. Ch.* 179.

So, if a sale was decreed after a contingency, and before that happens the executor dies; his executor, who claims the land after his death, may sell. *Ca. Ch.* 180.

So, if a sale is devised for charitable uses, the executor shall sell. *2 Jon.* 26.

So, shall the heir be decreed to join in the sale. *Ca. Ch.* 262. *R. 1 Ch. R.* 168. *R. 2 Ver.* 99.]

[If testator devises all his real and personal estate to be sold for payment of his debts, and no person named who is to sell, the executor and heir, and all proper parties to be named by the master, shall join in the sale. *Blatch v. Wilder, P.* 1738, *1 Atkyns*, 420.]

[If a man devise lands in *W.* to trustees, to raise money by sale to pay off what is due on lands in *S.* mortgaged to *A.* and settled on *B.* in fee, and his other debts, and then to *C.* his natural son; *A.*, *B.*, *C.*, the trustees, and the administrator, shall join in the conveyance, and *B.* shall covenant against her own acts, and the acts of her devisor, as to so much as she is benefited by the estate. *Lloyd v. Griffith, M.* 1745. *3 Atkyns*, 264.]

So, if land is devised for payment of debts and legacies, and no person named to sell, and it descends to the heir, the heir shall be decreed to sell. *R. 1 Lev.* 304. *1 Ch. R.* 287.

So, if the devise is, that the executors shall sell, and they die before a sale, the heir shall be decreed to sell. *R. Ch. Ca.* 180.

So, if the devisee is for portions of younger sons. *Agreed Ca. Ch.* 180.

So, if the devise is for a sale, and that the money shall be distributed to strangers. *R. cont.* for that amounts to a total disinheritance of the heir. *Ca. Ch.* 180.—*R. cont.* but it was reversed in Parliament, and then *R. acc.*

So, if the devise is, that the heir shall sell; his heir may sell. *2 Jon.* 26.

So, if the devised is, that after the death of *A.* the land shall be sold, without saying by whom, and *A.* is named executor, and after his death his executor sells; tho' the sale by him is void, yet the vendee shall have the land. *R. cont.* but it was reversed in Parliament. *2 Jon.* 26.

So, if a man devises, that *A.* and *B.* shall sell, who are not executors, and *A.* dies; *B.* with the heir shall sell, for it was a trust which survived. *R. Hard.* 204. *Semb.* *1 Jon.* 352.

So, if a devise is of land to *A.* and *B.* to be sold, and the heir is under age; a sale shall be decreed, without giving the heir, after he comes of age, time to join, for nothing descends to him. *R. 2 Ver.* 429.

[If lands are devised to trustees to be sold for payment of debts, the infant heir at law has no day given him to shew cause when he comes of age; but where the devise is to no person, he has. *Blatch v. Wilder, P.* 1738, *1 Atkyns*, 420.]

So, if a man devises lands to be sold by his executors, or to his executors to be sold; an interest vests in the executors. *Hard.* 419.

(3 A 8.) How expounded, where the Words are ambiguous.

If a man devises an estate to his executors equally; it does not survive. *R. 1 Ver. 32. Vide post. (3 V 3.) Vide in Devise, (N 8.)*

If he devises, that land shall be purchased with the residue of his personal estate, for the benefit of his wife for life, and afterwards for his executors, equally to be divided, and one dies; the other shall not have the whole, for it does not survive. *R. 1 Ver. 32.*

[If a man after giving legacies to be paid at particular times, devises the residue of his personal estate to his two sons, to be equally divided between them, and in case of either of their deaths, the whole residue to be enjoyed by the survivor; it shall be expounded, their death before twenty-one without issue. *Mendes v. Mendes, H. 1747, 3 Atkyns, 619. 1 Ves. 89.*]

[If one devises real and personal estate to trustees, to turn all into money, and then lay it out in land to the use of three persons for life as tenants in common, not as joint-tenants, but so that if either die without issue living at the time of his death, that share to go to the survivors, then to trustees to preserve, &c. then after their respective deaths to the first and other sons, then to daughters, then to ten grandchildren, their heirs, &c. equally, as tenants in common, not joint-tenants; and two of the nephews and three of the grandchildren die in testator's life, and third nephew dies leaving a son, he shall have only his father's share, the other two go over, but the shares of the three grandchildren who died are not transmissible, but lapse. *Sperling v. Toll, M. 1747, 1 Ves. 70.*]

[If testator desires the residue may be divided between *A.* and *B.*, it means equally divided, and they are tenants in common. *Peat v. Chapman, T. 1750, 1 Ves. 542.*]

If he devises the residue of his personal estate to *A.*, *B.*, and *C.*, and the wife of *C.*, *C.* and his wife shall have only one-third part, the wife only being a relation of the testator. *R. 1 Ver. 233.*

If a man devises 200 *l. per ann.* out of his manor of *Walden*, and he has the manor of *Walden* otherwise *Chippen Walden* of the value of 80 *l. per ann.*, and another manor of *Brook's Walden*; the charge shall be upon *Brook's Walden*, which is of greater value. *1 Ch. R. 138, 9.*

If he devises 500 *l.* to the eldest son of *B.* to be begotten, to put him out apprentice, the eldest son of *B.*, born after the death of the devisor, shall have it, before he is put out apprentice. *2 Ver. 431.*

If he devises lands to trustees, for *A.* and *B.* for their lives, and afterwards to the children of *A.* and *B.*, the children afterwards born shall take in common with those then in being. *R. Eq. Ca. 105.*

If a devise is to the younger children of *B.* who has a son, who is his heir; he shall not have any part of the thing devised, tho' he is younger in age to the other children. *1 Ch. R. 224.*

Tho' he was originally the younger son, but afterwards became the heir. *R. 3 Ch. R. 1.*

So, if portions are to be raised for younger children, as the father shall appoint; and he appoints to his second son, upon his marriage, being of full age, 2000 *l.*, who seven years afterwards becomes the heir

heir by the death of an elder brother without issue; the father may make another appointment of this sum, for younger children; for the first was upon a tacit condition, that the son provided for should continue a younger son. *R. 2 Ver. 530.*

But if land is settled to the use of the second son of *B.* in tail, if he takes the name of the donor, the second son shall have it, tho' he afterwards becomes the heir. *R. 2 Ver. 660.*

If a devise is of 20*l.* *per ann.* out of a term for years, if *A.* so long lives: if *A.* does live so long, and the devisee dies, his executor shall have it; for the payment continues during the term. *R. 2 Ver. 35. 666, 7.*

[If a man devise his real estate to his daughters, subject to an annuity to his son till he attains forty years, (hoping he will then have seen his folly,) then to him for life, with remainders over, and the son dies before forty, the devise to the daughters ceases. *Lomax v. Holmedon, H. 1732, 3 P. W. 176.*]

[But if the devise was a fund to pay debts or portions, it should continue till such time as *A.* should have attained forty. *Ibid.*]

If a devise is to the devisor's wife for life, and afterwards to his son and his heirs, *proviso* that if his son dies without issue, his daughter shall have 200*l.* If the son has issue at his death, the daughter shall not have the 200*l.*, tho' such issue dies within three months afterwards. *R. 2 Ver. 686.*

If a devise is of a college lease to *A.* for life, paying 10*l.* *per ann.* to *B.*, and afterwards to *B.*, the renewal ought to be made by *A.*, having a proportion of the fine from *B.* *R. 2 Ver. 667.*

If a man devises 5*l.* *per ann.* to *B.* during the life of his wife, upon condition that he behaves himself civilly to her, without saying to *B.* his executors and administrators; if *B.* dies in the lifetime of the wife, his executor shall not have it; for the bequest was personal to *B.* *R. Pr. Ch. 173.*

If a will is made in *Latin, Dutch, &c.* of lands in *England*, it does not pass the inheritance, where there are not proper words by the common law. *1 Ver. 85. 146.*

If *A.* devises his lands in *B.*, but the will is void for want of three witnesses, it is not sufficient to devise a term, which *A.* hath to attend the inheritance, tho' the words are sufficient to have passed it, if it was a term in gross. *R. Eq. Ca. 127.*

[If a man having freehold and leasehold at *A.* devises all his lands and tenements at *A.* by will, not in presence of three witnesses, neither freehold nor leasehold passes; tho' had it been duly executed, the freehold only would have passed, and had he had only leasehold, that would have passed. *Chapman v. Hart, T. 1749, 1 Ves. 271.*]

If a will is written in figures or obscurely, it may be referred to a master, to be assisted by persons having skill, to discover the sense. *P. W. 425.*

[If words are repugnant or nonsensical, they may be transposed or rejected; thus, if a man gives his daughter 6000*l.* for life, and after her death the interest to be divided between her husband and children, husband half for life, (*if no children*, interlined,) the children the other half; on his death, his half to the children, till the children attain twenty-one, the whole interest to husband; on his death,

death, they to have the remaining 3000 *l.*; if no children at daughter's death, or they die before twenty-one, then on further trust mentioned.—If there are no children, husband is entitled to the whole interest for life. *Boon v. Cornforth*, P. 1751, 2 *Ves.* 277.]

[A devise of the use of a house for life, plate, linen, and every thing else her occasions shall require; and that all goods, furniture, plate, books, pictures, and every thing else, shall remain and be enjoyed by the person in possession for the time being.—In the first, every thing else includes provisions, wine, corn, &c. in the latter not; in neither, canes, watches, India pieces not made up, &c. *Ibid.*]

[If a man give the use and occupation of his house, with stabling and fields, to his daughter for life, and then devises the three fields to her for life, without waste, and then over; the clauses are co-extensive, and she shall have the use for life. *Ibid.*]

So, if the name of a legatee is misspelt or mistaken. P. W. 425.

[A wrong description of a legatee will not defeat a legacy given to him by name. *Standen v. Standen*, 2 *Ves. jun.* 589.]

[If A. devises lands to her son B. and his heirs and assigns for ever, and if he dies in his minority and unmarried, or without issue, then to her son C., his heirs, &c.; this is a fee to B., with an executory devise to C., and if B. comes of age, marries, and dies without issue, the *or* shall be construed *and*, and the lands are subject to his specialty debts. *Framlingham v. Brand*, M. 1746, 3 *Atkyns*, 390. *Will.* 140.]

[If a man by will gives his real estate to his wife for life, and after her death, and failure of issue by him, to his sister A. with other remainders over, and all the limitations are for life; it shall be construed that it means a failure of issue during the lives in being, and so the limitation be good. *Trafford v. Boehm*, H. 1746, 3 *Atkyns*, 440.]

[If a father by will gives his real estate to his four sons, their heirs and assigns, to be equally divided between them *as tenants in common*, and not *as joint-tenants*, with the benefit of survivorship; and he has used the same words in a former clause relating to his personal estate, and giving them the benefit of survivorship, in case any of them died before twenty-one; the devise of the real estate shall be construed in the same manner. *Hawes v. Hawes*, T. 1747, 3 *Atkyns*, 524. 1 *Ves.* 13. 1 *Will.* 165.]

[If A. by will gives the residue of her estate, real and personal, to B. in trust, to pay the produce to C. for life, into her own hands, for her separate use, and after her death to her children, C. has no power to raise money by annuity for her life; and if she does, she shall be at liberty to redeem on paying principal and interest, tho' no clause of redemption. *Caverley v. Bisco*, T. 1747, 3 *Atkyns*, 541.]

[A. devised lands in trust, to pay the rents and profits to his daughter (whose husband was then living) for her life, notwithstanding her coverture, and not "to be subject to any control, &c. of her husband," nor liable to any debts which he "had or should contract." afterwards the deviser made a codicil, "taking notice of the death of his daughter's husband," wherein he ratified and confirmed his said will. The daughter is entitled under this devise to the rents

and profits, &c. "free from the control of any future husband." *Beable v. Dodd*, 1 *Term Rep.* 193.]

[If a man by will gives lands (and his personal estate to be laid out in lands) to charitable uses; then by codicil, reciting his will, the mortmain act, and his doubts whether his will is good, (yet being still desirous of confirming his will,) but if by law the estate cannot go to those uses, he devises it to *A.* and his heirs; and by another codicil, reciting he is advised the devise of his lands would be void, and it being his intention the charity should be continued, and being advised his personal estate can be given, he therefore gives his personal estate to the charitable uses, and his real estate to *A.*; the real estate is well devised to *A.* *Per B. R.* unanimous; and *Hardwicke C. Attorney-General v. Lloyd*, T. 1747, 3 *Atkyns*, 551. 1 *Ves.* 32.]

[If a man devises his estate to *A.* to settle it on *B.* for life, on *C.* for life, and then on any person or persons, for their several lives, who are descended from testator's mother, with power to revoke and appoint anew, provided it be to a descendant of his mother, his desire being, his estate should continue to persons always descended of his mother; and advises that a writing may be made to trustees for ninety-nine years to the said uses; *A.* may under this will limit an inheritance. *Godolphin v. Godolphin*, T. 1747, 1 *Ves.* 21.]

[If a man devises his real and personal estate to trustees for his daughter and her heirs for ever, proviso, if she dies before twenty-one or marriage, then to convey to his nearest relation of the name of *A.* and to his or her heirs, executors, &c. for ever; daughter dies under age and unmarried, the devise over is not void for uncertainty, nor shall go to the heir, nor be confined to a single person, but goes to the stock of the *A.*'s who were nearest, and as well those who had changed their names by marriage as others. *Pyot v. Pyot*, M. 1749, 1 *Ves.* 335.]

[If a man devise to his son, "all that estate I bought of *A.*;" both the land, and all testator's interest, in it passes. *Bailis v. Gale*, M. 1750, 2 *Ves.* 48.]

[If a man having a reversion in fee, devises to his son the reversion of the tenement *A.*; a fee passes. *Ibid.*]

[In a residuary devise where *estate* is mentioned generally, accompanied with personal things, it shall be restrained to personal; but where *real estate* is mentioned, the personal things mentioned are considered as an enumeration only. *Ibid.*]

[If *A.* devises all his real and personal estate in trust by *B.*, *C.*, and *D.*, and desires his debts and legacies to be paid, the heir he shall mention to be well educated, and that the first son of *E.*, when twenty-one, shall have all his estate real and personal; the personal passes first to the trustees for payment of debts, then the surplus belongs to *E.*'s son when twenty-one; and shall accumulate till then; the real estate passes to trustees, and the trust is an executory devise to *E.*'s son at twenty-one; the mesne profits to go to *E.* heir at law, till son born, then to the son for his education; (but *semb.* the surplus, if any, belongs still to *E.*) *Qu.* Why should not the profits of the personal estate be also applied to the son's education? *Bullock v. Stones*, T. 1754, 2 *Ves.* 521.]

[If *feme-covert*, with power, devises to her husband for life, then to her children if she should leave any to survive her, but if she should leave none, nor the issue of such, then to *A.*, making him sole heir in default of issue left by her, and after the husband's death; the children take an estate tail, not fee-simple, and the remainder to *A.* is good; for it is not a contingent executory limitation on her dying without children living at her death, but a general dying without issue. *Southby v. Stonehouse*, T. 1755, 2 Ves. 610.]

[Words shall receive a construction according to the subject-matter (as if freehold and leasehold are devised by the same words.) *Ibid.*]

[If *A.* having 400*l.* *South-Sea* annuities, and 400*l.* *East-India* stock, gives *B.* 10*l.* *per ann.* out of the dividends of the *South-Sea* annuities, and gives *C.* the 400*l.* *East-India* stock, and gives *D.* the 400*l.* *South-Sea* annuities, subject to the payment to *B.*, and he afterwards buys 100*l.* more *South-Sea* annuities, and sells the *East-India* stock, and buys 800*l.* more *South-Sea* annuities, and is afterwards paid off the first 400*l.* and the other 100*l.* *South-Sea* annuities by a draught, which he lodges with *E.*, directing him to vest it in three *per cent.* annuities, but *E.* vests it in *South-Sea* annuities, and *A.* makes a codicil, and devises the note for 500*l.* in *E.*'s hands to *F.*; the legacy of 10*l.* *per ann.* and the specific legacies of the funds are gone, and *F.* is entitled to the produce of the note. *Drinkwater v. Falconer*, T. 1755, 2 Ves. 623.]

[In a devise of all his stock in trade, only shop goods and utensils in trade are included; not book-debts, cash, bills, or money in goldsmiths' hands. *Seymour v. Rapier*, in Sc. M. 1718, Bunb. 28.]

When words in a devise shall be expounded otherwise than in a deed, *vide* *Legacy*, *post.* (3 Y 1.)

When the devisee shall have the same privileges as an heir, *vide* *Legacy*, *post.* (3 Y 2.)

(3 B) Discovery.

(3 B 1.) When a Bill lies for a Discovery.

SO, a bill in equity lies for discovery of a title and deed. *Vide post.* (3 I 1.)

[So, for a discovery of matter to constitute a defence at law; as, where *quare impedit* was brought against the ordinary by the patron for refusing to institute his clerk, a bill filed by the ordinary to discover whether the clerk presented to him had not given a general bond of resignation, in order to set this up as a defence to the *quare impedit*, was allowed on demurrer. 1 *Brown*, 96.]

For discovery of court rolls, ledgers, &c. to be used at a trial, which relate to the plaintiff and defendant. *R. Hard.* 180.

[Every heir at law has a right to a discovery by what means and under what deed he is disinherited. *Harrison v. Southcote*, T. 1751, 1 *Atkyns*, 528. 2 *Ves.* 389.]

[The heir at law has a right to have deeds and writings produced, and lodged in proper hands for his inspection, before he has established his title, and to remove terms out of the way that might prevent his recovering possession at law. *Ibid.*]

[The lord of a manor may bring his bill for discovery of *treasure-trove*. *Sloane v. Heathfield*, *M.* 1717, in *Sc. Bunb.* 18.]

[Any person in possession, as tenant or otherwise, may bring bill for discovery of his title who brings ejectment against him, even tho' he is a wrong-doer against every body. *Metcalf v. Hervey*, *T.* 1749, 1 *Ves.* 248.]

So, it lies for discovery of goods put on board a ship, tho' insured at a sum certain, interest or no interest; for the value of the goods saved ought to be deducted out of the sum to be paid for insurance. 2 *Ver.* 716.

So, a bill for discovery of a note, deed, &c. lies after six years are elapsed; for the statute of limitations is no plea to it. *R. Ch. R.* 14. *D. & Ch. Westminster v. Crofts*, in *Sc. P.* 1720, *Bunb.* 60.

A bill for discovery ought to charge expressly, that the defendant has the deeds, goods, assets, &c. *Ca. Ch.* 226.

[When a man brings bill for discovery only of deeds, and to have them established, he shall annex affidavit that he has them not, or is in cause of demurrer; but where he also prays relief, affidavit is not necessary. *Johnson v. Elleker*, in *Sc. P.* 1720, *Bunb.* 46.]

[If a bill is brought for relief as well as discovery of deeds, an affidavit must be annexed that plaintiff has not the deeds, or defendant may demur. *Anon. M.* 1743, 3 *Atkyns*, 17.]

[On a bill for discovery only, plaintiff cannot reply, and must dismiss and pay costs, tho' he has had discovery and defendant was the occasion of the bill. *Calverly v. Parker*, *H.* 1722, *Bunb.* 124.]

If to a bill for discovery, it appears that there was such a deed, and that it is suppressed by the defendant, there shall be a decree for enjoyment by the plaintiff, until the defendant produces the deed; but not upon a supposition of a deed suppressed, when it does not appear whether there was such a deed. 2 *P. W.* 680.

[If plaintiff claiming by a remainder in tail, expectant on *B.* tenant in tail's dying without issue, brings a bill against the sisters and heirs of such tenant in tail, who answer, that *B.* executed a lease and release to make a tenant to the *præcipe*, suffered a common recovery to the use of himself in fee,* and refer to the deeds in their custody, the court will, before hearing, order defendants to leave the deeds with their clerk in court. *Bettison v. Farringdon*, *T.* 1735, 3 *P. W.* 363.]

[The counsel who draws a deed of annuity, and is executor to the annuitant, and submits to produce the draught by his answer, and does not insist on privilege, as a counsel, may be ordered to produce it before the hearing. *Stunkope v. Roberts*, *M.* 1741, 2 *Atkyns*, 214.]

[A defendant may be obliged to discover a case which he had stated to his own counsel for opinion, and the facts contained in the case. *R.* on demurrer, and affirmed by the Lords, *ibid.*]

So, a bill lies for discovery of assets, to enable the plaintiff to bring an action at law against an executor or administrator. *Vide ante*, (2 *G* 3.)

And it lies before probate, or *pendente lite* for a probate. *Ver.* 49.
Or, against an heir.

[On a bill for executing a trust, by settling an estate on the several branches of a family, plaintiff a younger brother has a right to a discovery

discovery from an elder brother, whether he has a son who would be the first entitled to the inheritance, but not, whether he is married. *Finch v. Finch*, M. 1752, 2 *Ves.* 491.]

So, for a discovery of the personal estate of B. in the defendant's hands, after judgment and execution sued against B., but not before execution sued. *Scuib.* 1 *Ver.* 399.

[If a bill is brought for discovery of bankrupt's effects, the court will not allow defendants to look into their depositions before the commissioners, before they put in their answers. *Baden v. Dellow*, H. 1747, 1 *Atkyns*, 289.]

So, a bill for discovery, to enable the plaintiffs to bring an action, was allowed, tho' the action sounded in tort. R. 1 *Ver.* 307. 2 *Ver.* 442, 3.

As also for a discovery of tithes, by colour of a sequestration, tho' it is a trespass against the parson. R. *Hard.* 182.

[So, for a discovery of a matter which subjects the party to a penalty, if he hath agreed to deduct the value of those goods which he had traded in, out of the freight. *Qu.* 2 *Ver.* 244.]

So, for discovery of a matter which subjects the party to a penalty, if he has covenanted to answer any bill of discovery, and not to plead the acts inflicting penalties. *East-India Company v. Atkyns*, T. 5 G. in *Canc.* Str. 168.]

So, for a discovery of wine imported, for which prisage is due. *Hard.* 138.

So, against an auditor for a discovery whether the particular by him made is true; tho' he is fineable for the deceit to the king, if false. *Hard.* 138.

So, against a woodward, if he cuts or wastes the woods of the king. *Ibid.*

[Every person necessary to the discovery should be made a party, to prevent multiplication of suits. *Plunket v. Penfon*, T. 1740, 2 *Atkyns*, 51.]

[Discovery in equity is not confined to the rule of law for inspecting books; thus the lord of one manor may have leave to inspect the books of another manor here, tho' not at law. *Anon.* T. 1755, 2 *Ves.* 620.]

(3 B 2.) When not.

But a bill for discovery of deeds, or a title, does not lie against him who is a purchaser for a valuable consideration, without notice. R. upon a *Plea*, Ch. R. 35. *Vide ante*, (1 1.) *post.* (4 I 1, &c.)

So, it does not lie for an heir against a jointress, if the plaintiff does not confirm her jointure. 1 *Ver.* 479. [1 *Ves. jun.* 76.]

Tho' the jointure was made after marriage, without articles precedent. 1 *Ver.* 479.

[A widow is not obliged to discover an offer to confirm her jointure, till the act of confirmation is done. *Leech v. Trollop*, T. 1755, 2 *Ves.* 662.]

[On a bill against a jointress to deliver up one part of settlement, she having two, the court will not on motion order it to be delivered up, that being the very end of the bill, but to be produced before the matter. *Aston v. Aston*, H. 1745, 3 *Atkyns*, 302.]

Nor, for a discovery who has the freehold of lands, unless in the case of dower or partition. *Hard.* 139.

[If plaintiff sets out a title, and that certain old terms are standing out, and defendant does not plead, but sets up a title inconsistent with plaintiff's, he is not obliged to discover what deeds he has relating to his own title; but if there is any charge in the bill that defendant has deeds of plaintiff's title, it must be answered. *Buden v. Dore*, T. 1752, 2 *Ves.* 445.]

So, it lies not against a devisee, for discovery of his title by the will, to the heir. *Semb. Ch. R.* 36.

Nor, against him who has land contiguous, for discovery of the boundaries of his lands in his deeds. *R.* 2 *Ver.* 38.

Nor, against the assignee of a term, for a discovery of the beginning and continuance of the term, of which he was a purchaser. *R.* 2 *Ver.* 255.

So, it lies not for him in the remainder in tail in a voluntary settlement, after the estate-tail is discontinued. 2 *Ver.* 35.

Nor, for the issue in tail. *R.* 2 *Ver.* 50.

So, upon a bill for the discovery of a deed, upon a suggestion of a trust, if the defendant denies the trust he shall not be obliged to produce the deed. 2 *Ver.* 463.

So, a bill does not lie for the discovery of a matter, which subjects the party to a penalty or forfeiture, if the plaintiff does not waive the penalty or forfeiture. 1 *Ver.* 109. 129. 306. 1 *Ch. R.* 144.

And the waiver ought to be by all those who can claim any part of the penalty or forfeiture; for if the penalty belongs one half to the king, and the other to a corporation, the waiver by the corporation, and not by the attorney-general also, is not sufficient. 1 *Ver.* 129.

As, it does not lie for a discovery, whether the party imported cards without licence; for it may subject him to the penalty of the statute. *Hard.* 138. 144.

For discovery, whether he heard mass, took usury, &c. *Ibid.*

Whether he is a popish recusant. *Hard.* 142.

[If a bill is brought to discover whether *A.*, under whose will defendant claims, was a papist at the time of purchasing from plaintiff's ancestor, defendant is not bound to discover, but may plead the *stat.* 11 & 13 *W.* 3. *Smith v. Read*, H. 1736, 1 *Atkyns*, 526.]

[If a bill is brought against *A.* and *B.*, to discover whether *A.* and his wife, under whom he claims, were not papists, *B.* who purchased from *A.* is not obliged to discover, but may plead. *Harrison v. Southcote*, T. 1751, 1 *Atkyns*, 528. 2 *Ves.* 389.]

[No man is obliged to discover what may subject him, or what must only. *Ibid.*]

[To a bill for discovery of a marriage, defendant may plead that it would subject her to punishment for incest in the ecclesiastical court, tho' the husband is dead. *Brownsword v. Edwards*, H. 1752, 2 *Ves.* 243.]

[If a portion is given over on marriage without consent, defendant may demur to discovery of the marriage only, tho' discovery of the consent is not prayed, and altho' a plaintiff is entitled to a dis-

a discovery of a marriage in the case of an estate during widowhood, with remainder over; for the first is a forfeiture, the last is only a conditional limitation. *Chancery v. Fenboulet*, P. 1751, 2 *Ves.* 265.]

[Defendant may plead to discovery of an act which would cause a forfeiture, but not to discovery of what estate he hath; as, whether tenant for life or not, tho' on that the forfeiture depends. *Weaver v. E. Meath*, M. 1750, 2 *Ves.* 108.]

Whether he conceals customs or excise. *Dub. Hard.* 137. 146. 201.

[If the attorney-general exhibits an information to discover waste, &c. he must waive forfeitures. *Waters v. Vincent*, H. 1742, *Bunb.* 192.]

[On a bill to stay waste, plaintiff cannot have a discovery unless he waives the double penalty. *Boteler v. Allington*, H. 1746, 2 *Atkyns*, 453.]

[If A. gives bond to B. to pay 800*l.* per ann. whilst he or any body in trust for him holds a certain office, B. sues on the bond, A. brings bill for injunction, B. cross-bill to discover whether C. does not hold the office in trust; A., who is a member of parliament, is not obliged to discover, for it would vacate his seat; this he must insist on by answer, for demurring would have been admitting the facts. *Honeywood v. Selwyn*, M. 1744, 3 *Atkyns*, 276.]

So, a bill does not lie for a discovery of receipts and acquittances given, or payments made for goods after a recovery for the goods in an action at law. 1 *Ver.* 176. 3 *Ch. R.* 17.

Nor, for a discovery of things not examinable or relievable in equity; as, the ill usage of a husband to his wife. *R. upon a Demurrer*, 1 *Ver.* 204.

Nor, for a discovery of the tenant of the freehold, in order to bring a *formedon*. *R.* 1 *Ver.* 212. 273.

Nor, for discovery of the profits of a trust estate (if the trust is denied) till the trust is proved; for it is sufficient that the party shall afterwards be examined upon interrogatories. *R. Ch. R.* 4.

Nor, against the clerk of the company of *Skinners*, for a discovery of accounts and books in his custody, which he is sworn not to shew without the consent of the company. *R. upon a Plea*, *Ch. R.* 24.

[The court will not compel a discovery to create evidence for a future cause. *Finch v. Finch*, T. 1752, 2 *Ves.* 491.]

Nor, for a discovery of assets against an executor or administrator, till assets are denied by a plea at law.

Nor, for discovery of assets, upon a decree to pay out of the assets, till the decree is signed, inrolled, and served. *Ch. R.* 34.

Nor, for the discovery of the consideration of a bond (not obtained by fraud, as it seems) after an assignment thereof to the king. *R. Hard.* 200.

[The court will not admit a bill of discovery in aid of the jurisdiction of the ecclesiastical court, for they can come at discovery themselves. *Dun v. Coates*, M. 1738, 1 *Atkyns*, 288.]

[If a bill for discovery, and perpetuating testimony, in praying process, prays that defendant may abide the order and decree of the court, it makes it a bill for relief, and ought to be dismissed. *Rose v. Gunnel*, H. 1746, 3 *Atkyns*, 439.]

[Bill for discovery does not lie against one for what he may be examined to, as one who is merely a witness claiming no interest, but he must plead thereto, and support it by answer, disclaiming interest, and a demurrer is bad. *Plummer v. May*, H. 1749, 1 *Ves.* 426.]

(3 C) Dismes.

When Tithes shall be decreed in *Chancery*.

SO, *Chancery* will compel the payment of tithes. 2 *Ca. Ch.* 237. 1 *Ca. Ch.* 233. *Vide Dismes*, (M 13, &c.) *Vide Courts*, (D 2.) *Vide post.* (3 X).

[This court never dismisses a bill for tithes, unless there is a good legal or equitable bar. *Douglas v. Vane*, H. 19 G. 2. *Will.* 128.]

A parson or impropriator, or his lessee, may exhibit a bill against the parishioners for discovery and payment of the single value of their tithes. *Vide* 1 *Ver.* 60.

[The owner and lessee of a rectory may bring a bill for tithe in kind, and so establish a custom of setting out in flocks, tho' there is a derivative lease in being. *Archbishop of York v. Stapleton*, H. 1740, 2 *Atkyns*, 136.]

So, the executor of a parson, &c. may exhibit a bill for arrears in the time of his testator, without offering to take the single value; for he is not entitled to the penalty of the *st.* 2 & 3 *Ed.* 6. 13. *R. upon Demurrer*, 1 *Ver.* 60.

But the parson himself ought to make an offer to take the single value. *Semb.* 1 *Ver.* 60. *Vide Dismes*, (M 13.)

But *Chancery* will not by a decree establish a *modus*, and that the land shall be discharged of tithes *in specie*; tho' there is a verdict for the *modus*. *Ca. Ch.* 187. *R. upon Demurrer*, 1 *Ch. R.* 27.

[If a bill is brought to establish a *modus* against the lessee of the impropriator, the impropriator must be a party also. *Glanvill v. Tre-lawney*, in *Sc.* H. 1720, *Bunb.* 70.]

[If a bill is brought to establish a *modus*, and on an issue directed there is a verdict in favour of the *modus*, the court will establish it, and direct costs at law, but not in equity, to be paid plaintiff. *Clifton v. Orchard*, H. 1737, 1 *Atkyns*, 610.]

[If the *modus* is too rank (as 48*l.* *per annum*, for the tithes of a manor, the whole demesne lands of which were worth but 48*l.* in *Q. Elizabeth's* time) the court will decree tithes in kind. *Ekin v. Pigot*, H. 1745, 3 *Atkyns*, 298.]

[Three shillings for a lamb is so rank a *modus*, that the court will determine against it, without sending it to a jury. 2 *Brown*, 163.]

[Tho' a *modus* may appear something too rank, yet if there is no other objection to it in law, nor any evidence of tithes being paid in kind, this court will not direct payment in kind without an issue. *Chapman v. Smith*, T. 1754, 2 *Vesey*, 506. *Ekins v. Dormer*, T. 1747, 3 *Atkyns*, 534.]

[The court will not grant an injunction to stay proceedings in the ecclesiastical court, on a suggestion that there is a *modus*. *Rotherham v. Fausbaw*, H. 1747, 3 *Atkyns*, 628.]

[Of late, the court does not require the time of payment of a *modus*

modus to be particularly laid, such a time, or *thereabouts*, is sufficient. *Carte v. Ball*, P. 1747, 3 *Atkyns*, 496. 1 *Ves.* 3. *Richards v. Evans*, 1 *Ves.* 39.]

[But a custom must be substantially laid, therefore it must be alleged by whom a *modus* is to be paid. *Ibid.*]

[Setting up a *modus* does not preclude defendant from objecting to plaintiff's title to tithes. *Ibid.*]

[If the vicar be endowed *de omnib. minut. decim. inf. paroch.* he shall have a decree for tithes, after verdict found, on issue directed, that none had ever been paid to him, nor to a third person out of *A. Fox v. Rutty*, in Sc. M. 1721, *Bunb.* 87.]

[A grant from *Q. Mary*, with the general words *decimas bladorum et feni, et omnes alias decimas*, are not sufficient to bar a rector of his common right of tithes, unless it is expressly stated what was the right of the crown. *Ekins v. Dormer*, T. 1747, 3 *Atkyns*, 534.]

So, if a bill is filed in *Chancery* for the tithes and bounds of a parish, and the plaintiff, after answer, exhibits a bill in the *Exchequer*, and there proceeds to the examination of witnesses, and then replies in *Chancery*; the proceedings and examination in the *Exchequer* may be pleaded against an examination for the same matter in *Chancery*. *R. Ca. Ch.* 233.

So, if the defendant has a verdict and judgment upon the *st.* 2 & 3 *Ed.* 6. 13. for not setting out tithes *in specie*, it may be pleaded to a bill brought for a *modus*. *R. Ch. R.* 13.

[This court has jurisdiction to inquire, whether the lord mayor of *London* has done right in refusing to grant a warrant to levy a minister's dues under *st.* 22 & 23 *Car.* 2. c. 15. and if he has done wrong, to issue a warrant for levying the sum assessed. *Ex parte Croxall*, P. 1748, 3 *Atkyns*, 639.]

[If the county in general is concerned in a tithe cause, (as *Kent*, in a *modus* in *Romney marsh*,) the court will order trial in another, (as *London* or *Middlesex*.) *Chapman v. Smith*, T. 1754, 2 *Ves.* 505.]

[In *Chancery*, an account of tithes shall be carried down to the time of the master's report, in the *Exchequer* to the time of filing the bill only. *Bell v. Reed*, M. 1747, 3 *Atkyns*, 590.]

[Lease of tithes for all the time the lessor shall continue vicar is good, and conveys a freehold, the delivery of the deed being tantamount to livery of seisin in the case of land. *Brewer v. Hill*, *Anstr.* 419.]

[Account decreed of tithes in *London*, according to the improved rent: one of the defendants setting forth his lease at a low rent, and a fine: and alleging by answer that he had never heard of any greater rent having been paid, and there being no evidence to the contrary, was held liable only according to that rent. *Canons of St. Paul's v. Crickett*, 2 *Ves. jun.* 563.]

[Bill to establish the rector's right to tithes, and for an account. The defence, tho' informally stated, as a prescription *de non decimando* in a *que estate* was as to two-thirds possession by the lord of the manor, under an apparent title by various conveyances, &c. stated by the answer from 37 *H.* 8. of the lands, with tithes generally, or two-thirds specifically, with evidence of reputation, and notice to the plaintiff, who had purchased the advowson, and was lessee of the tithes; but the commencement of the title did not appear. Bill dismissed with costs. *Strutt v. Baker*, 2 *Ves. jun.* 625.]

(3 D) Distribution of Intestates' Estates.

(3 D 1.) By the *St. 22 & 23 Car. 2.*

Chancery will enforce a distribution upon the *St. 22 & 23 Car. 2. 10.* concerning the estates of intestates. *2 Vent. 362. 1 Ven. 134. Vide in Administration (H).*

Tho' the defendant pleads a jurisdiction reserved by the same stat. to the ecclesiastical court to make a distribution. *R. 2 Ca. Ch. 95.*

[An estate *pur autre vie* is distributable in equity, tho' not in the spiritual court. *Witter v. Witter, H. 1730, 3 P. W. 99.*]

So, if an infant sues for a distribution in the ecclesiastical court, and afterwards sues here, the suit depending there is no plea to the bill for the same cause in Chancery. *Vide post. (3 Y 3.)*

[Aunts and nephews are in equal degree of relation, and shall take *per capita*, and not *per stirpes*. *Durant v. Prestwood, T. 1738, 1 Atkyns, 454.*]

[If an intestate leaves only an aunt, a son of a brother, and a daughter of a sister, they take equally. *Lloyd v. Tench, H. 1750, 2 Ves. 213.*]

[If *A.* and his wife *B.* have two sons, *C.* and *D.*, who both marry in their father's life, *A.* dies, *B.* survives, *C.* dies, leaving children, *D.* dies intestate, leaving *E.* his widow. *E.* shall have two-fourths, *B.* one-fourth, and the children of *C.* one-fourth among them. *Stanley v. Stanley, P. 1739, 1 Atkyns, 455.*]

(3 D 2.) *Who shall be excluded from a share upon a distribution.* But if an husband covenants, &c. that his wife at his death shall be worth 600*l.* and her share under the stat. of distribution exceed that sum; it goes in satisfaction of the agreement, and she shall not have the 600*l.* and then her share by the stat. *R. 2 Ver. 709.*

[If by articles before marriage the terms therein are declared to be to the wife, then an infant, in satisfaction of all claim of dower, or any claim by common law, custom of the city, or any other usage, law, or custom; the wife has her election at the death of the husband, and if she accepts the terms in the articles, she cannot have a distributory share on her husband's dying intestate, for that would be a claim under a law, viz. the statute of distributions. *Glover v. Bates, T. 1739, 1 Atkyns, 439.*]

[If a man by articles previous to marriage covenants by will, or good assurance in law, to grant to his wife, or her mother in trust for her, 1000*l.* to be paid after his death, if she survives; and if he shall not so assure, then his executors or administrators shall pay it; and he dies without making such deed or will, she is not entitled to her distributory share. *Lee v. Cox, H. 1746, 3 Atkyns, 419. 1 Ves. 1.*]

[If a man covenants to leave his eldest son by his first wife 500*l.* in case he marries a second wife, and he does marry a second wife, and dies intestate; the eldest son shall bring his 500*l.* into hotchpot, if he comes for a share of the personal estate. *R. 2 Ver. 639. 2 P. W. 427.*]

So, if he covenants to leave to his wife 1500*l.* in full of dower, thirds, custom

custom of *London*, or otherwise, out of his real or personal estate; she shall not have distribution upon the stat. *R. 2 Ver. 725.*

[The estate of an intestate, leaving a brother and a grandfather, shall go wholly to the brother, the grandfather has no right to share. *Evelyn v. Evelyn, H. 1754, 3 Atkyns, 762.*]

(3 D 3.) By Custom.

So, a man may enforce a distribution of the goods of an intestate, pursuant to a custom in the province of *York*. *1 Ch. R. 79.*

[If a man dies intestate in the province of *York*, leaving his son *B.*, who dies soon after, and his wife *C. enfeint* of *D.* *D.* is entitled to her share, as if born before intestate's death, and his estate shall be divided into nine parts, four of them *C.*'s, four of them *D.*'s, and the other ninth to be equally divided between them. *Wallis v. Hodson, H. 1740, 2 Atkyns, 115.*]

Or, upon the custom of *London*. *1 Ch. R. 84. 1 Ver. 61. Vide in Guardian, (G 2.)*

And if a freeman of *London* dies intestate, his personal estate shall be distributed, a moiety, or two-thirds, according to the custom, the residue according to the *st. 22 & 23 Car. 2. 1 Ver. 134.*

So, in *York*. *R. 1 Ver. 305. 314. 432. 465.*

And a bill, for distribution to the wife of her share, shall be allowed, tho' the husband had left *London* before his marriage, and resided in the country for twenty years, and settled a jointure upon his wife. *R. upon a plea of such matter, 1 Ver. 180. 2 Ver. 110.*

If all the children are advanced by the father in his lifetime, the distribution of the whole shall be according to the *st. 22 & 23 Car. 2. 1 Ver. 200. R. 2 Ver. 274.*

If the wife is barred of her share by a special agreement, it shall be distributed amongst the children. *Dub. 2 Ver. 263.*

If a man devises a moiety of his estate to his wife, she shall have a moiety by the custom, and also a moiety of the residue. *2 Ver. 111.*

So, if a fraudulent gift, &c. is made to prevent the custom, a bill may be brought to avoid it. *Ch. R. 16. 2 Lev. 130.*

As, if a man by deed disposes of his goods in his lifetime, but keeps the goods, or the deed in his custody. *2 Ver. 277.*

But if he absolutely gives away the goods, *bonâ fide*, in his lifetime to his children, or otherwise, it will be no fraud. *Ibid.*

(3 E) Dower.

(3 E 1.) Wife favoured by Equity.

[If a woman is entitled to dower by law, *Chancery* does not bar her; as, if *A.*, for securing 100*l.*, makes a bargain and sale to *B.* and his heirs, to the intent that he should re-demise to *A.* for life, and upon condition that the bargain and sale shall be void on repayment: *B.* re-demises, and afterwards *A.* repays the money; the wife of *B.* being dowerable by law shall not be restrained by *Chancery*; for it was the folly of *A.* that he did not make the bargain and sale to two persons, as is usual. *Eq. Abr. 217. Cro. Car. 190. Vide post. (3 E 2.) Vide Marriage Settlement, post. (3 Z 1.) Vide ante, (2 M 12.)*

If a father purchases in the name of his son, and gives him possession, who afterwards executes a declaration of trust to the father, but

but continues in possession, his wife shall be endowed; for the declaration of trust is fraudulent to creditors and purchasers. *R. Eq. Abr.* 218.

If a man devises an estate for payment of debts, and afterwards to his son in tail; the wife of the son shall be endowed; for the devise for payment of debts is but a chattel interest; but she shall not have possession until the debts are paid. *Ibid.*

So, if the lands of the husband are sequestered before marriage, his wife shall be endowed. *Ibid.*

If a woman recovers dower against an heir being an infant, when there was a term to protect the inheritance, which by neglect of the guardian was not pleaded; the term shall not be set up against her in equity. *Ibid.* 219.

So, a woman shall be aided in equity for her dower against a term for years, which attends the inheritance, if it is not in the case of a purchaser. *R. 2 P. W.* 639. 646.

So, she shall be entitled to the equity of redemption against a mortgagee, paying a third of the principal, or a third of the interest. *2 P. W.* 632.

So, if the estate is in trust for *B.* and his heirs, who directs the trustees to convey to his son in tail, at the age of twenty-one years; and after twenty-one the son marries, and dies; his wife shall have dower of the trust estate in equity. *Per Jekyll, 2 P. W.* 641. 647.

So, of a trust estate in fee, made by the ancestor of the husband. *Semb. per Jekyll, 2 P. W.* 641. 650. *Vide 3 P. W.* 229.

[If *A.* buys customary freehold lands, which are conveyed to him, and *B.* and the heirs of *A.*, and *A.* devises them to his son *C.* in tail, and dies, and *C.* dies, living *B.*; *C.*'s widow cannot have these lands as her free-bench, nor as customary dower, as it is out of the trust of a freehold estate, the legal estate standing out in *B.* *Godwin v. Winifmore, H.* 1742, *2 Atkyns*, 525.]

But a woman shall not be endowed in equity of an estate limited to trustees in trust for the husband and his heirs. *Eq. Abr.* 217. If it was done by the husband himself, or for the benefit of a mortgagee, or other purchaser. *2 P. W.* 640.

[Nor, of an equity of redemption on a mortgage in fee. *1 Brown*, 326.]

[The wife of a *cestui que trust* of a rent-charge is not to be endowed of it. *Chaplin v. Chaplin, H.* 1733, *3 P. W.* 229.]

Nor, of a trust term, assigned for the security of a purchaser. *2 P. W.* 639.

So, a woman shall not be endowed, where her husband devises land to her in satisfaction of dower, if she does not waive the devise, for she shall not have both. *Vide Eq. Abr.* 218.

[But, by electing the dower, she gives up the devise: as, where 1000*l.* a-year was given to the wife by will in lieu of dower, but if she married again 100*l.* a-year in lieu of all other benefits, if she marry and elect her dower, she shall not have the 100*l.* a-year. *1 Brown*, 445.]

But a devise shall not be intended to be in bar of dower, if it is not expressed; and therefore, tho' the husband devises a personal estate and land to his wife for life, and the residue of all his estate to *A.*, the wife shall have dower also. *R. Eq. Abr.* 218. *Vide post.* (3 E 2.)

[So, the devise of a rent-charge is not a bar of dower, unless it be

so expressed, or the estate be so small as to shew that it must have been so intended. 1 *Brown*, 292.]

[If a woman marries without settlement, and by act of her husband is barred of her own fortune, and he by will devises her his personal estate at his seat, and a remainder for life of his real estate, in default of issue male and female by himself, this does not bar her of dower out of that very estate. *Incedon v. Northcote*, H. 1746, 3 *Atkyns*, 430.]

[If a man by will, taking no notice of his wife's claim to dower, devises her the residue of his personal estate, it is no bar to her dower. *Ayres v. Willis*, P. 1749, 1 *Ves.* 230.]

[If a widow entitled to dower comes to account for the profits of the estate of which she is in possession as trustee for her son, she shall be allowed for the profits of her dower, future, as well as past, and shall not be drove to her writ of dower. *Graham v. Graham*, T. 1749, 1 *Ves.* 262.]

[If a widow suffers an annuity granted to her by settlement, and the interest of money left her by her husband's will, to run in arrear for eight years during her son's life, she shall have remainder over; for it shall neither be presumed that she is satisfied, nor that it was fraudulently intended in prejudice to the remainder. *Aston v. Aston*, T. 1749, 1 *Ves.* 264.]

[The court will not oblige a jointress to bring her jointure-deed into court, or before a master, unless the party requiring it will confirm it: but will order her to deliver in a schedule of deeds, to order what shall be produced. *Petre v. Petre*, P. 1747, 3 *Atkyns*, 511.]

[A widow shall not be put to her election to take under her husband's will, or her dower, except by the express declaration of the will, or by necessary inference from the inconsistency of her claim, with the dispositions contained in it. R. by M. R. *French v. Davies*, 2 *Ves. jun.* 572.]

[Widow put to her election to take under her husband's will or dower, notwithstanding great disproportion. *Wake v. Wake*, 1 *Ves. jun.* 335. 3 *Bro. Ch. Ca.* 225. S. C.]

[Receipt of a legacy and annuity under the will for three years, held not to prevent her right of election, as she was presumed not to have acted with full knowledge. *Ibid.*]

[To compel a widow to elect to take under a will, or dower, her claim to dower must be inconsistent with the will. *Strahan v. Sutton*, at the Rolls, 3 *Ves. jun.* 249.]

[Plea of purchase for a valuable consideration not good to a bill for dower. *Williams v. Lambe*, 3 *Bro. C. C.* 264.]

[Where testator by his will gave his wife an annuity, held that she was, notwithstanding, entitled to dower. *Foster v. Cook*, 3 *Bro. C. C.* 347. *Middleton v. Cater*, 4 *Bro. C. C.* 409.]

[Dower barred by settlement previous to marriage, and during the infancy of the wife, of stock, and lease property, partly the husband's, and partly the wife's. *Williams v. Chitty*, 3 *Ves. jun.* 545.]

[Leasehold estate settled "in lieu of dower" not a bar of thirds. *Creswell v. Byron*, 3 *Bro. C. C.* 362.]

(3 E. 2.) Dower, when aided, and when not.

If a woman has recovered dower, Chancery will ascertain her third part by a commission. 1 *Ch. R.* 38. [If

[If lands descend to two in coparcenary, and one, before receipt of rent or partition made, dies, his widow suggesting that the other has the title-deeds, shall have relief in equity for that reason, and because she must come there for a partition. *Moor v. Black*, T. 9 G. 2. C. T. T. 126.]

If the sheriff by collusion assigns a third for dower more valuable than either of the other third parts of the estate; the court will direct a new assignment. 1 *Ver.* 218. 2 *Ca. Ch.* 160. *Eq. Abr.* 220.

So, tho' there is not any collusion in the sheriff, when the assignment is not equal. 2 *Ca. Ch.* 160.

So, if the husband covenants that the jointure shall be of such a value, the wife may bring a bill in equity for discovery of assets and satisfaction, tho' equity does not decree damages; but the master upon such a bill shall report the deficiency, and the court will decree a satisfaction, or a trial. *Eq. Abr.* 18.

If A. makes a fraudulent conveyance, and afterwards marries, his wife shall have relief against it. *Ibid.* 220.

So, a woman shall be allowed her dower, tho' land is devised to her for life, and all the real estate to another, if it be not in satisfaction of dower. *Cont. per Lord Somers; Acc. per Wright*, 2 *Ver.* 365. *R. acc. in Parliament*, *Eq. Abr.* 218, 219. *Vide ante*, (3 E 1.)

So, the wife of one, who had the trust of a copyhold, where the custom allows to the wife her *free-bench*, if the trustees refuse to surrender to the husband, shall be allowed her *free-bench* in equity. *R.* 2 *Ver.* 585.

So, a woman shall not be restrained from having her dower, where the husband makes a settlement upon her in consideration of the marriage portion, if it is not expressed to be in bar of dower, and it does not appear to be expressly intended. *R. Eq. Ca.* 152.

[A general provision for a wife is not a bar of dower, unless expressed so to be; neither a general devise of lands, nor a bond for money; but if it is expressed to be for her livelihood and maintenance, it is a bar. *Tinney v. Tinney*, M. 1743, 3 *Atkyns*, 8.]

[But a jointure made with approbation of parents and guardians on an infant shall not be set aside, because it is inadequate to the dower, unless it appears to be a mere elusory jointure. *Harvey v. Ayley*, P. 1748, 3 *Atkyns*, 607.]

[And if a jointure is made after marriage, and the widow, still an infant, without doing any act to determine her election during her infancy marries again, and the second husband enters on the jointure estate, that entry binds them during coverture. *Ibid.*]

If the wife joins in a fine to a mortgagee, for barring her dower, upon an agreement by the husband that she shall have the equity of redemption in lieu of dower, and afterwards the husband makes two other mortgages; the agreement for the redemption will be fraudulent as to the subsequent mortgages, but the wife shall have her dower in equity, notwithstanding the fine. *R.* 1 *Ver.* 294. *Eq. Abr.* 219.

If a personal estate is vested in trustees upon trust to pay 100*l.* per ann. to the wife in lieu of dower, tho' she accepts it for many years, if the personal estate afterwards proves deficient, she shall be supplied out of the real estate. *R. Ch. R.* 134.

If A. devises land for payment of his debts and legacies, and afterwards

terwards to his son in fee; the wife of the son shall have dower from the time the debts and legacies are paid, tho' her husband dies before that time. *R. 2 Ver. 404. Eq. Abr. 218.*

But a woman tenant in dower shall not have the benefit of a term to attend the inheritance. *R. 1 Ver. 357. Ca. Parl. 69. Vide post. (4 G 5.—4 W 19. 22.)*

[If *A.* purchases of *B.* a real estate in mortgage for a term, and it is agreed to pay off the mortgage out of the purchase money, and to assign the term to attend the inheritance, which is done, *B.*'s widow shall not have dower. *Hill v. Adams, T. 1741, 2 Atkyns, 208.*]

So, a woman, entitled to dower of a manor, shall not have a third part of the improved values of copyholds, which her husband enfranchised after marriage. *Ca. Ch. 246, 7.*

[If husband dies entitled to copyhold estates in a manor whereof he is lord, and the sheriff estimates them upon the writ of inquiry for ascertaining the dower, this court will set aside the assignment of dower; and of such estates as the husband became entitled to by copy of court-roll, and granted out again by copy of court-roll, the wife shall not have dower; and as to lands whereon leases for lives or years were renewed by the husband, of those which were not actually expired at the renewal, she shall not have dower for the instantaneous seisin, but of those which were expired, she shall. *Sneyd v. Sneyd, T. 1738, 1 Atkyns, 442.*]

So, a woman shall not have relief for dower of an estate, which was in trust for her husband. *1 Ch. R. 254. Eq. Abr. 217.*

So, if the husband purchases land of *A.*, who has only an estate for life, but covenants that he in the reversion shall convey, and he conveys to the heir of the husband; the wife shall not have relief in equity for her dower; for her husband was not seised, but only for the life of *A.* *R. Ch. R. 369.*

So, if *A.* purchases *Whiteacre* of *B.*, who makes him a lease of *Blackacre* for securing the purchase, and dies, and his son enters: the wife of the son shall not have dower, other than subject to the term. *Eq. Abr. 219.*

So, if a wife having a jointure of 400*l.* per ann. joins in a sale thereof with her husband, who afterwards settles 150*l.* per ann. on himself for life, and afterwards on his wife and the heirs of her body, (without an agreement that other land should be settled in recompence,) and afterwards dies without issue, and the wife suffers a recovery, and devises for payment of her debts; he in the remainder shall be aided against the devisee; for it was a forfeiture within the *st. 11 H. 7. R. Eq. Abr. 220.*

So, if the husband gives a bond to settle land upon his wife for life, and afterwards to the children; she shall be barred of her dower. *Per King, 5 Geo. 2. 17.*

So, a wife shall not have a provision by her husband for her jointure, and also a distribution upon the *st. 22 & 23 Car. 2. Vide ante, (3 D 2.)*

[When the husband dies seised, there shall be no mesne profits till demand; when he does not die seised, there shall be no mesne profits; when the widow is in possession she may have remedy at law, if he have any right to mesne profits. *Delver v. Huxter, in Sc. H. 1719, Bumb. 57.*]

[A bill was filed by a widow against the heir of her husband for dower;

dower; her right to dower being denied by the answer, the bill was retained for a year, to try her title at law, and a writ of dower brought; before issue joined, the heir died, the widow established her right against his devisee: the widow dying, her representative filed a bill of revivor and supplement against the executor and devisee of the heir, for a third part of mesne profits during the life of the widow from the husband's death, which was decreed, and the decree affirmed on re-hearing, by *Arden, M. R.* 2 *Brown*, 620.]

[Bill for dower and arrears since the death of the husband: defendant demurred, and by answer admitted the right, and stated an offer to assign and to pay the arrears from the claim, and set forth in a schedule all the rents he had received from the husband's death, with the deductions to be made. Demurrer over-ruled, the answer having left no question to be tried at law; for whether a widow is entitled to arrears of dower from her husband's death, or only from her claim, cannot be decided on a writ of dower. *Mundy v. Mundy*, 2 *Ves. jun.* 122. 4 *Bro. C. C.* 294. *S. C.*]

[If a legal title to dower is controverted, it must be made out at law; if not controverted, it is like the right of a tenant in common, and *Chancery* has long entertained suits for partition on bills for dower. 2 *Ves. jun.* 128.]

[Writs of dower almost absolute, equitable bars to dower being now in daily practice. *Ibid.* 129.]

[A tenant for life, remainder to *B.* in tail, by fraud procures *B.*'s authority to levy a fine, sells the lands and dies, having invested the purchase money in the funds, when it remains clearly identified: *A.* held to have been a trustee for *B.* to the amount, and therefore, that he has a general charge on *A.*'s estate, but not a specific lien on the money. *Newcomb v. Burdon, Anstr.* 343.]

(3 F) Equity.

(3 F 1.) Relief, when allowed in Equity.

(3 F 1.) *In cases of fraud, accident, and trust.* A Court of equity will give aid principally in cases of fraud, accident, and trust. *Vide ante* (C 2.—Z). *Post.* (3 M 1.—4 W 1.) [1 *Ves. jun.* 545.]

And equity will give release in such cases, tho' it is agreed, that no relief shall be prayed in equity. 1 *Mod.* 305.

So, equity will relieve, tho' the party himself upon oath in a former answer, &c. denied his right to it. *Vide post.* (4 W 5.)

Tho' the party has obtained a judgment at law. *Vide post.* (3 W).

[On a bill against judgment, on an absolute promissory note suggesting that the note was agreed to be conditional, plaintiff was relieved, and was permitted to give parol evidence of the intent of a note in writing underhand. *Snowball v. Vicaris, T. 10 G. Bunb.* 175.]

[On a bill against a judgment, on proof that two notes, which would have been a defence at law, were mislaid at the trial, and since found. *Vernon v. Minsbul, T. 1724, Bunb.* 178.]

[On a bill against a judgment, by default on a *South-Sea* contract, and issue directed to try whether the defendant was possessed of the stock. *N. B.* It appeared plaintiff had been guilty of subornation of perjury. *Anstruther v. Christie, T. 1724, Bunb.* 178.]

[*A.* files a bill against *B.* his father, to recover (*inter alia*) 20,000*l.* on

on bond, conditioned to pay 10,000*l.* and interest; *B.* demurs, for that plaintiff has remedy at law; demurrer allowed; *A.* brings action, and on *solvit ad diem* pleaded, obtains a verdict; then *B.* files bill, shewing the bond to be voluntary, intended to be of force only till some settlement made, that he had since given him 10,000*l.* on marriage, covenanted to give him 10,000*l.* more, settled 1000*l.* per annum in land in possession on him, transferred larger quantities of stock to him, the bond thirty years standing and no demand; he shall have injunction. *Humphreys v. Humphreys*, *M.* 1735, 3 *P. W.* 395.]

Tho' the contract be made originally by or with the king himself. *Hard.* 373.

[If plaintiff brings bill for discovery of coals wrought under his land, and for satisfaction against several defendants, some executors, some administrators, and it would be difficult for him to proceed at law, the court will retain the bill. *Taylor v. Crompton*, *M.* 1721, *Bunb.* 95.]

[A bill may be brought for a preacher's pension only. *Bailey v. Cornes*, *M.* 1724, *Bunb.* 183.]

If an heir (of age) is imposed upon, by a tradesman's selling to him at exorbitant prices in many instances, the court will relieve; not if in one instance only. *Berkley Freeman v. Bishop*, *P.* 1740, 2 *Atkyns*, 39.

[The court will relieve an heir against fraud, whether the estate in expectancy is to come from his father, or from any other relation. *Ibid.*]

[If a mortgage is taken to secure such price, the court will relieve as far as the unjust gain, but for what is found due on *quantum meruit* it shall stand good. *Ibid.*]

[If *A.* puts mortgages into the hands of *B.*, to receive the money, and he pawns them to *C.* for 100*l.*, for which he gives his note, and takes *C.*'s to restore them on payment, *C.* shall be decreed to deliver them to *A.* and take his remedy at law against *B.* on his note. *Jackson v. Butler*, *P.* 1742, 2 *Atkyns*, 306.]

[Where one party sets up a title inconsistent with the title set up by another party, and fails in his own claim, yet he may appear to have a right to something under the other's claim, and the court will not deprive him of it. *Bennet v. Lee*, *H.* 1742, 2 *Atkyns*, 529.]

[Shares in water-works, (as the *New River*,) tho' a legal estate and corporeal inheritance, are properly sued for in this court. *Lord Townsend v. Windham Ash.* *P.* 1745, 3 *Atkyns*, 336.]

[If an estate has been sold by *A.* to *B.* and the money paid, and it appears that the estate was *B.*'s, the money shall be refunded with interest for bringing the bill, tho' there was no fraud. *Bingham v. Bingham*, *M.* 1748, 1 *Ves.* 126.]

[If a deed is destroyed or concealed by defendant, plaintiff may have relief in equity. *Whitfield v. Fauisset*, *H.* 1749, 1 *Ves.* 387.]

[Or, if the deed is lost, and plaintiff cannot recover at law without a *proferri*, he shall have relief in equity. *Ibid.*]

[If a bill prays specific performance, and also general relief, and the court will not decree the specific performance, it will not relieve on

the general prayer, if inconsistent with the particular relief prayed, *Legal v. Miller*, T. 1751, 2 *Ves.* 299.]

[On equity reserved, the court refused to increase damages, on suggestion that interest was omitted on taking the verdict at law, through mistake, on the supposition that it would be given in equity. *Stevens v. Praed*, 2 *Ves. jun.* 519.]

[A. tenant in tail with a power to lease, remainder to B., wife of C. in tail, conceiving himself to have obtained the fee under a void execution of a power, made leases exceeding his power, reciting, that he was seised of the freehold and inheritance, and covenanting for quiet enjoyment against any act or default of himself, or those claiming under him: A. devised the said estates and others to B. for life, remainder to trustees to preserve, &c. remainder to her first and other sons in tail male, remainder to her daughter and her first and other sons, and to D. and his first and other sons, successively in the same manner, and gave to B. and C. other benefits by his will, and gave the residue to D., who filed a bill to have the will established; B. elected to take her estate tail in opposition to the will, which the master reported to be for her benefit; after her death, C., who had taken under the will, claimed as tenant by the curtesy, and brought ejectments against the lessees, some of whom had expended considerable sums on their tenements: held that neither the lessees nor D. were entitled to stop the ejectments, or to put C. to his election; but an injunction was granted on their undertaking to bring on their causes the following term. *Lady Cavan v. Pulteney*, 2 *Ves. jun.* 544. Causes heard and determined, 3 *Ves. jun.* 384.]

[The equity to compel election distinguished from an express condition. 2 *Ves. jun.* 560.]

[Election applies to interests of married women, interests immediate, remote, contingent, of value or not of value, real or personal. 2 *Ves. jun.* 697.]

[Lessee covenanted to repair, accidents by fire and tempest excepted; the house being damaged by a tempest, and requiring immediate repair, lessee repaired it, and claimed to be allowed out of the rent, what he had so expended: lessor brought an action for the whole rent. Equity will not interfere to restrain him. *Waters v. Weigall*, 2 *Anstr.* 575.]

[Devise for life of a rent charge out of an estate, devised in strict settlement, assigned it to creditors, as a collateral security. Tenant for life, with intent to redeem it for the annuitant, gave bonds to the creditors, on condition of giving up their securities to annuitant to be cancelled. Executors of obligor paid all the bonds but one, which they disputed, because, tho' delivered by obligor to a third person for creditor, when he should agree; it was not accepted till after death of obligor. This bond was recovered upon at law; annuitant held to be entitled as against the executors to the annuity disencumbered, and waiving arrears incurred in life of obligor, to be also entitled against tenant of the estate to arrears, since the obligor's death; but future payments left to agreement, as heir at law of devisor of the annuity not being a party, execution of the trusts of the will could not be decreed. *Graham v. Graham*, 1 *Ves. jun.* 272. in *Exchequer*.]

[Court

M.

[Court of equity does not interfere for volunteers. 1 *Ves. jun.* 275. in *Exchequer*.]

[Payment in the name of *A.* with his money raises a trust, but it is an equity which may be rebutted by evidence. *Ibid.*]

[Election to take under, or in opposition to, a will, can be compelled only on expressions in the will, not *dehors*. *Stratton v. Best*, 1 *Ves. jun.* 285. See also *Wilson v. Mount*, 3 *Ves. jun.* 191.]

[Wife entitled under bond by the husband on the marriage to a sum payable three months after his death for her for life, then for the children; if none, for her absolutely: by will he gave all his real and personal estate he then had or might die possessed of, upon trust, to pay her the rents and interest for life, then the whole equally to the children; if none, over; and revoked all former settlements and wills. There were no children; widow held entitled to both. *Forfight v. Grant*, 1 *Ves. jun.* 298. 3 *Bro. C. C.* 242. *S. C.*]

[When there may be a remedy at law, yet if it be doubtful or difficult, equity will hold jurisdiction. 1 *Ves. jun.* 424.]

[Creditor by judgment in *Jamaica* filing a bill here for satisfaction out of rents and profits remitted, and to be remitted, must shew his judgment to differ from a judgment here, so that he cannot affect the land. *Cathcart v. Lewis*, 1 *Ves. jun.* 463. 3 *Bro. C. C.* 516. *S. C.*]

[No equity for a judgment creditor, that there are prior judgments. *Ibid.* 464.]

[Tenant for life exonerated by the assets of a preceding tenant, who received the money on a mortgage in which they joined. *Finch v. Finch*, 1 *Ves. jun.* 534.]

Where the transaction is come mala fide.] So, equity will relieve where an act is against good conscience, tho' fraud is denied: as, where a man sues at common law, for a violent retaking of money won by play, an injunction shall be granted. 1 *Ver.* 489, 490.

If *A.* unseals and displaces writings delivered to his custody, by which evidence may be suppressed; his demands shall be disallowed, tho' he swears that all the papers are produced. 1 *Ver.* 452.

If a trustee purchases the estate for life of the husband at an under-value, when he absconds from his creditors, *Chancery* will direct a re-conveyance for the benefit of creditors, upon repayment of principal and interest. 1 *Ver.* 465.

[If a lease is made of an estate belonging to a church, by a deceit on the court by the rector, who takes a fine, tho' not mentioned in the proposal laid before the master, his executor shall refund the fine, to be laid out in purchase for benefit of successors; but the lease shall stand good, if the lessee was not privy. *Galley v. Baker*, T. 9 G. 2. *C. T. T.* 199.]

If a man advances sums of money to young persons, and takes joint securities of them for large sums, each of them shall have his security delivered up to him, upon payment of the money advanced to himself. 1 *Ver.* 467.

[If a father intrusts his heir (an infant) to a servant, the son comes of age and gives bond for 1000*l.* to the servant, unknown to the father, and not having wherewith to pay it, equity will set aside the bond, as obtained by fraud and a breach of trust. *Osinond v. Fitzroy*, M. 1731, 3 *P. W.* 129.]

[But equity will not set aside a bond, if there is no fraud or breach of trust, merely because the obligor is a weak man. 3 P. W. 129.]

[If *A.* sells an annuity for his own life to *B.* with a clause of redemption in three years, and eleven years after *A.* applies to *B.* to redeem, which he refuses; the court will order a redemption on payment of the annuity to the time of the application to redeem, and the principal sum advanced, without interest from that time. The annuity was purchased at seven and an half years purchase, which seems a fair price. *Stanhope v. Cope*, M. 1741, 2 *Atkyns*, 231.]

[If *A.* entitled to an annuity on personal security of 200*l.* *per annum*, being a prisoner, sells to *B.* 150*l.* *per annum*, part of it, for 1050*l.* with proviso that if *A.* desires at any time to purchase back said 1050*l.* on six months' notice, *B.* on payment of said 1050*l.* (all arrears of annuity being paid), shall resign; and there is an indorsement, that if *A.* should re-purchase or redeem, he shall pay 75*l.* more; this is unreasonable, vitiates the whole, and the agreement shall be set aside. *B.* shall re-convey, on payment of principal, interest at 5*l.* *per cent.* and what money has been actually paid for insurance; and if he is overpaid by receipt of the annuity, he shall refund. *Lawley v. Horper*, M. 1745, 3 *Atkyns*, 278.]

So, if *A.* sells an office in the army to *B.*, and afterwards procures him to be turned out. 2 *Ca. Ch.* 2, 3.

If a barrister at law undertakes the recovery of an estate to which *B.* hath a right, and obtains of *B.* a bond to surrender to him a moiety of the estate, when it shall be recovered; he shall be decreed to deliver up the bond, and re-transfer the estate, upon payment of the whole by him expended, with an allowance for his care. *R. Ch.* R. 477.

[*A.* gives *B.* his attorney a memorandum expressing his intention to make *B.* a present of 1000*l.* when he should be able, on his coming into possession of *C.*'s estate, to which he was to succeed on *C.*'s dying without issue; and that his executors, in case of his death, were to pay the same to *B.* Several accounts were afterwards settled between them for business done and money lent and laid out by *B.* to *A.*'s use, mixed with charges for costs; and balances were struck, and securities taken by *B.* on every balance, in all which occasions some money was received by *A.* to whom *B.* also sold a colt for 150 guineas, payable on the death of *C.*, which was afterwards sold for 12. During these transactions, *A.* gave his bond to pay to *B.* 1000*l.* at the death of *C.* absolutely; and afterwards a farther security was created by a term of 60 years on *A.*'s said reversionary interest. Court ordered *B.*'s bill to be taxed, and declared, that the securities should stand for what was actually due, the bond for 1000*l.* void, and the securities of no effect as to that; that *A.* should be at liberty to redeem on paying what was due when defendant should re-convey; and that the matter should inquire into the value of the horse. *Newman v. Payne*, 2 *Ves. jun.* 199. 4 *Bro. C.C.* 350. *S.C.*]

So, if a trustee for *A.* takes a security for 600*l.*, with his privy, of *B.*, and afterwards for 600*l.* assigns it to *C.*, who relies upon the words of the trustee; *A.* shall be relieved against *C.*, tho' both are defrauded; for *C.* put the greater confidence in the trustee. 2 *Ca. Ch.* 77.

[If an attorney for the seller on the sale of an estate does not disclose

close to the buyer an incumbrance, he is liable to make satisfaction. *Arnot v. Biscoe*, T. 1748, 1 Ves. 95.]

If an administrator during the minority of an infant sells, as his own, the stock of the infant, in the *East-India Company*, to B. who by entries in the books of the company hath notice that it was the stock of the infant; the infant shall be relieved against B. R. Ch. R. 298.

[If it is alleged that a promissory note for a large sum was given to induce a man to withdraw a suit, and deliver up a note of a third person, (and this not with intention of paying the money, but as a security of procuring a living for him,) and the note itself and the consideration denied, the court will (without sending the question of forgery to trial) order the note to be left with the register, and if not sued in reasonable time, to be delivered up. *Bishop of Winchester (Hoadly) v. Fournier*, T. 1752, 2 Ves. 445.]

(3 F 3.) When not.

(3 F 3.) *If a man will not do equity.*] But a man, who will not do equity, shall not have relief in equity; as, if a jointress hath a lease, which she confesses was to attend the inheritance, on a bill brought by the heir for deeds in her possession, on a confirmation of her jointure, she shall not have her jointure confirmed, without delivering up the lease. 1 Ver. 480.

If A. sues B. who purchased in trust for him, and paid the money for making the conveyance: on repayment, A. ought also to pay all other monies due from him to B. 2 Ca. Ch. 87.

[If A. has a judgment against B., and also a mortgage on his estate, without notice that C. has a judgment subsequent to A.'s judgment, but prior to the mortgage; equity will not direct a sale of B.'s estate on a suit of C. and consent of B., unless C. will pay off the subsequent mortgage as well as the prior judgment. *Smithson v. Thompson*, M. 1739, 1 Atkyns, 520.]

[This rule does not extend to all cases, so as to tack together things independent in their nature, but the court will lay hold of any circumstance for it, as danger from absconding or living abroad. So, if A. is decreed to account to B. who ought to convey an estate to A. who has often absconded, A. shall account before B. shall convey. *Shilb v. Foster*, H. 1747, 1 Ves. 88.]

If an heir comes to redeem a mortgage made by his father, he ought also to discharge the bond of his father, in which the heir is bound, or other mortgage, defective, made by his ancestor, before a redemption shall be allowed him. *Vide post.* (4 A 10.)

[If tenant in tail pays off a mortgage without taking an assignment of it, the remainder-man shall pay it to his representative, or he shall not have an assignment from the mortgagee. *Kirkham v. Smith*, T. 1749, 1 Ves. 258.]

If a man sues trustees for the portion of his wife, he ought to make a suitable settlement. *Vide post.* (3 Z 5, 6.)

If a man devises lands in tail to one son, and in fee to another; the son who claims the land in fee under the will ought to release his interest to the land intailed, to the other; *et c contra.* 2 Ver. 582.

But if a corporation, trustees for a charity, make a lease and co-

tenant, in consideration of 100*l.* to be expended by the lessee for repairs, to renew, and the lessee covenants to pay an additional rent; the rent shall be paid, tho' the corporation is not compelled to renew. *R. 2 Ver. 412.*

(3 F 4.) *If his actions are wrongful.*] So, if an obligor prays relief from the penalty of a bond given to maintain a bastard, and for payment of 50*l.* to the woman; if it appears that he was a suitor to the woman, and abused her, he shall not have relief, tho' he brings the 50*l.* into court. *R. 2 Ca. Ch. 15.*

So, if a man, by practice obtains a bond of 1600*l.* upon the loan of 90*l.*, he shall not have relief out of the trust estate of the obligor, for any part of the debt, tho' 90*l.* was *bonâ fide* due. *R. Ca. Ch. 202.*

If a woman who elopes, and is divorced *a mensa & thoro*, sues for a settlement made by her husband for alimony, she shall not be aided. *1 Ver. 53. Semb.*

If there is a covenant that tin shall be delivered custom free to *B.*, and the tin is afterwards seized for the customs, *B.* shall not be relieved. *Ca. Ch. 256.*

[Tenant for life having made a lease of coal mines amounting to a forfeiture, cannot join the remainder-man in a bill for an injunction. *Wentworth v. Turner, 3 Vef. jun. 3.*]

(3 F 5.) *Tho' a man's expectation is frustrated.*] So, equity will not give relief against a contract by *A.* tho' his expectation is frustrated, where no default was on the other side; as, if a bond be to give 100*l.* to *B.* if he surrenders his office, which is with an intent that the obligor should obtain it; if he does not obtain it, if *B.* surrendred, he shall not be relieved. *R. 1 Ver. 98, 99.*

[If *A.* agrees with *B.* for a number of tickets at a stated price, and all profit to be *A.*'s, but he loses by them; the court will not relieve, even if it was a hard bargain, unless there is fraud or undue means. *Willis v. Fernegan, H. 1741, 2 Atkyns, 251.*]

(3 F 6.) *Nor, when a reasonable benefit has accrued to another by law.*] So, equity does not take away a reasonable benefit, which accrues to another by strict rules of law; as, if a marriage-settlement is made to *A.* for life, and afterwards to his first, second, and other sons in tail male, and if no son living at the death of *A.* to the use of his daughters, till such portions paid; *A.* dies having daughters, but no son living, his wife *privement enseint* with a son, afterwards born, equity will not take away the portions vested by accident in the daughters, tho' contrary to the intent of the parties, if it is a reasonable provision. *Semb. 2 Ver. 579.*

[If *A.*, mother of *B.*, wife of *C.*, is seised in tail *ex provisione viri* of lands, reversion in fee to her husband, and *B.* and *C.* create a mortgage term on these lands, and *A.* joins in levying fine to the use of the mortgagee, remainder to such uses as *C.* shall appoint, or in default to him and his heirs; and before this *C.* has sold an estate to *D.* and covenanted for quiet enjoyment, and afterwards makes an appointment to trustees of *B.*'s estate; *D.* is evicted, *C.* dies, *A.* dies; if it does not appear that the breach of *C.*'s covenant by

by the eviction of *D.* happened before the appointment made by *C.* the court will not grant relief. *White v. Sanfom*, *H.* 1746, 3 *Atkyns*, 410.]

[The court will not relieve against a master's right to his apprentice's earnings, who quits his service before his time (tho' he goes to sea and takes a great prize, but in that case recommends them to compound, and favourably for the apprentice). *Meriton v. Hornsby*, *M.* 1747, 1 *Ves.* 48. *Hill v. Allen*, *H.* 1747, 1 *Ves.* 83.]

(3 F 7.) *Nor, against a statute.*] So, equity will never give relief against a provision by act of parliament: as, if a lease by a bishop, &c. is void; tho' the lessee has equity against the bishop, he shall not be relieved against his successor; for the statute which makes the lease void, does not save any equitable right. *Ca. Ch.* 227.

[So, when the effect of the relief would be ultimately to defeat the statute, tho' not contrary to the words of it; as, in the case of a lease from a corporation, the court will not enforce a renewal on particular terms, for that would be equivalent to an alienation which is against the statutes of *mortmain*. 1 *Brown*, 61.]

[If a trustee in breach of trust, presents a man to a living; after six months' plenarty, this court will not give relief, for it is against *stat. Westm. 2.* *Boteler v. Allington*, *H.* 1746, 3 *Atkyns*, 453.]

So, if a court erected by act of parliament determines a thing within their jurisdiction, there shall be no relief in equity. *R. Ch.* 320.

[But if a new act of parliament is made to alter the law, and the judges are formal in adhering to rules of law, and will not construe according to the words and intentions of the act, (tho' it is their business to mould their practice so as to render it conformable to the legislature,) there equity will take it up, and give remedy. *Basset v. Basset*, *M.* 1744, 3 *Atkyns*, 203.]

(3 F 8.) *Or, a maxim at law.*] Nor, contrary to an express maxim of the common law, unless in case of fraud, &c. as if an obligee releases to one obligor only, he shall not have aid against the other, tho' he did not intend to release the other. *R. 1 Rol.* 374. l. 21.

[So, where articles of agreement for the lease of a house had been entred into between defendant the landlord, and plaintiff who appeared to act as a single woman, but afterwards it appeared to be doubtful whether her husband was alive at the time of entering into the agreement, the court seemed to think they could not decree a specific performance against the landlord, if he insisted on the strict rule of law by which the agreement was void, but recommended his granting the lease on her finding a proper security for the rent, which was consented to. *Newton v. Luxton*, *Easf.* 1790, in the *Exchequer*.]

If a deed or will is not duly executed, equity will not relieve: 2 *Ver.* 475.

[If one executor receives and releases the whole debt, the other shall not be relieved. *Mo.* 620.]

Or, one joint-tenant, tho' there was a bill against the debtor, or an agreement to divide the debts.

So, there shall be no relief against a descent according to the rules of law, tho' the estate is in trust. 2 P. W. 668, 9.

[If a man has lost his right by a legal bar, he can have no remedy. *Brereton v. Gamul*, H. 1741, 2 *Atkyns*, 240.]

But upon circumstances, *Chancery* will direct contrary to a rule in law; as, upon a bill, it will change the *venue* to another county, by reason of the great power of the defendant in the proper county. 1 *Ver.* 439.

(3 F 9.) *Not where the plaintiff has the same relief by law.*] So, if the plaintiff has equal relief and benefit by the law; as, upon a bill by the executors of the husband, to be relieved against a contract of the wife, because she had eloped, and had a separate maintenance, and that it was known to the defendant; for this is a good defence to an action at law. 1 *Ver.* 71.

[So, a bill will not lie against several for a mere legal demand, tho' some of the parties be dead or bankrupts. 1 *Brown*, 27.]

[Nor, against several tenants of a manor for quit-rents, for there is a clear legal remedy by distress and replevin. *Id.* 200.]

[Unless where the premises are uncertain, and the remedy thereby embarrassed. *Id. ibid.*]

[So, a bill will not lie by the parishioners of one parish, against those of another, to ascertain the boundaries of the two parishes. *Id.* 40.]

So, if a bill be against an executor for debt, tho' the debt is proved in equity, the plaintiff shall not be relieved till a recovery in an action at law; and then he shall have an account whether there are assets. R. 2 *Ver.* 192.

[But if a bill be brought to discover assets and payment of a bond, and there is no dispute as to the bond or assets, equity will provide for the payment of the debt. *Heath v. Percival*, M. 7 G. Str. 403. *Bishop v. Church*, M. 1750, 2 *Ves.* 100.]

[Where the executor or administrator confesses a liquidated debt, there discovery draws on relief, otherwise not. *Per Gilbert Ch. B. Alpot v. Thompson*, in Sc. P. 1726, *Bunb.* 29.]

[If on coming in of answer to a bill for discovery of assets and relief, plaintiff makes his election to proceed at law, yet he may afterwards, on agreeing to drop that part of the bill which prays relief, have the order of election discharged. *Fitzgerald v. Sucomb*, M. 1740, 2 *Atkyns*, 85.]

[If the representative of an intestate is seeking to give preference by confessing judgments, the court will let plaintiff proceed at law to get judgment with stay of execution, and in this court for discovery of assets at the same time. *Burker v. Dumaresque*, H. 1740, 2 *Atkyns*, 119.]

[If there is a judgment obtained for a partnership debt against A. surviving partner, and one of the executors of B., and A. gives a mortgage on the separate estate of B., equity will order satisfaction out of the mortgage, without sending them to law. *Jacomb v. Harwood*, P. 1751, 2 *Ves.* 265.]

If an executor pleads to three actions, *no assets ultra 100 l.* where he hath only 100 l. assets *in toto*; he shall not be relieved in equity; for it was his own fault to plead negligently. 1 *Ver.* 119.

So,

So, equity does not aid, if the defendant by the mistake of his attorney pleads an improper plea. *R. 2 Ver. 325.*

[If a bill is brought to discover assets and for relief, the court will grant relief if the defendant joins issue, not if he demurs. *Depuis v. D. of Kingston, T. 1718, Thomas v. Williams, in Sc. M. 1718, Bunb. 29.*]

So, equity does not give the same relief, which the plaintiff may have by an action at law.

[If a bill is brought for treasure-trove, plaintiff shall have no relief; for he might have brought action of trover, and bill dismissed with costs. *Sloane v. Heathfield, in Sc. M. 1717, Bunb. 18.*

[A bill for several tolls, where the decree would bind only the defendants, dismissed. *Disney v. Robertson, in Sc. P. 1719, Harding v. Ainge, T. 1719, Bond and the city of Exeter, Bunb. 41.*]

[But if a fee-farm rent is reserved, it gives the court of Exchequer jurisdiction. *Per Montague B. cat. dissent. Attorney-General v. Eyre, in Sc. M. 1720, Bunb. 68.*]

[Bill for a toll due to a town does not lie, tho' a fee-farm rent is payable by the town. *Nottingham v. Wood, M. 1733, Bunb. 330.*]

[Bill for beaconage dismissed. *Mayor of Boston v. Jackson, H. 1721, Bunb. 101.*]

[So, for suit of court. *Thornhagh v. Hartborn.*]

[So, for fee-farm rent, or law-day silver. *Pynsent v. Skillings, T. 1727, Bunb. 237.*]

[A bill to have the enjoyment of a watercourse, and damages for stopping it, does not lie. *Reynolds v. Hind, P. 1729, Bunb. 264.*]

[If *A.* gives voluntary deed to pay *B.* 60 *l.* per ann. with power to distrain on lands, or to pay *B.* 1000 *l.* with interest, and *B.* brings bill, setting forth, that the lands are incumbered, and to be paid one or the other, and *A.* brings cross-bill, and at the hearing *B.* does not prove that the lands were so incumbered that she knew not where to distrain, the court will retain the bill till *B.* has tried her remedy at law. *Thurkettle v. Howorth, M. 1727, Bunb. 241.*]

[If a bill is brought for wharfage, &c. and defendant admits plaintiff's right, but sets up an exemption for a particular place, the court will not dismiss the bill, but will give leave to bring an action at law. *Town of Poole v. Bennet, T. 1729, Bunb. 270.*]

[Bill for discovery and relief against defendants, who broke into intestate's room, and took away money, bonds, &c. does not lie, if defendants deny the equity. *Kerslake v. Pannel, T. 1730, Bunb. 287.*]

[A single copyholder is not relievable in equity against an excessive fine; but several copyholders are against a general fine. *Cowper v. Clark, M. 1732, 3 P. W. 155.*]

[Disputes between masters and apprentices are no foundation for coming into equity. *Argles v. Heafeman, M. 1739, 1 Atkyns, 518.*]

[This court cannot set aside a will for fraud, but only direct an issue *deviseavit vel non*; for a will of personal estate may be set aside in the ecclesiastical court for fraud, and of real estate at law. *Powis v. Andrews, H. 1723, Bennet v. Vade, T. 1742, 2 Atkyns, 324.*]

[A person

[A person claiming lands under marriage articles and settlement, which he has in his custody, and where no terms are standing out, must establish his title at law before he can come into this court for deeds and writings. *Warwick v. Warwick*, H. 1745, 3 Atkyns, 291.]

[If plaintiff comes properly into this court, (as for discovery of deeds, and to have them produced, or for an account of rents and profits,) it will determine a matter of law. *Ld. Townsend v. Windham Ass.*, P. 1745, 3 Atkyns, 336.]

[A bill for an account and share of prize-money does not lie against the representative of an admiral; the remedy is at law against the agents for captures. *Ogle v. Representatives of Haddock*, M. 1748, 1 Vesf. 161.]

[If A. loses B. a banker's note, payable to him or bearer, and B. offers to pay the money, on the usual security to indemnify; A. dies without doing it, and his representative, seven years after, brings bill for payment, but there is no affidavit of the loss, nor offer of indemnity; this court will not relieve, but leave him to action at law. *Whalmfley v. Child*, M. 1749, 1 Vesf. 341.]

[If there is a list of bank-notes in a testator's writing, some marked paid, others unpaid, and these have not appeared in many years, and are supposed to be lost, and the executor swears he believes testator had lost them, and offers to give security, yet the court will not order payment; for the testator's hand is no evidence here more than at law, therefore the same remedy at law. *Glynn v. Bank of England*, M. 1750, 2 Vesf. 38.]

[A creditor by *elegit* executed may have relief against a fraudulent conveyance, tho' he might have relief at law. *Bennet v. Musgrave*, M. 1750, 2 Vesf. 51.]

[If the precedent conveyance is only voluntary, without other fraud, subsequent purchaser for valuable consideration shall be left to his remedy at law. *Ibid.*]

[If A. treats with B. for the loan of money, A. dies abroad, which B. not knowing, pays it to C., his agent, who remits it in bullion; A.'s executors receive it, and remit it back to England, to the executors of A.'s father; B. cannot have relief against them, but must try it at law against C., or the executors of A. abroad. *Eyre v. Eyre*, M. 1750, 2 Vesfey, 86.]

Nor, will it give relief in execution of a sentence of an ecclesiastical judge; as, for the quieting of the possession of a pew in the church, after a decree for it by the ordinary. 2 Ver. 226.

[If *spoliation* or suppression of a will is clear, the court will give relief without making the plaintiff cite the defendant in the spiritual court, or directing an issue at law. *Tucker v. Phipps*, T. 1746, 3 Atkyns, 359.]

Nor, against churchwardens, to enforce the signing of a rate to reimburse what the party had expended by order of vestry, after they are out of their office. 2 Ver. 262.

[The court will not receive a suit relating to church rates, for the ecclesiastical courts have jurisdiction; unless prescription is alleged. *Anon.* T. 1752, 2 Vesf. 451.]

But where a man has privilege in the court, he may sue there for a matter

matter for which he has an action at law; as, a solicitor may have a bill for fees in a suit in *Chancery*. 1 *Ver.* 203.

[Yet to such a bill a plea, good at law, shall be allowed; as, that he did not deliver a bill signed pursuant to the *st.* 3 *Jac.* 6. 1 *Ver.* 312.]

[Bill for a legal demand retained, with liberty to bring an action, the assistance of the court being necessary on equitable circumstances. *Stevens v. Praed*, 2 *Ves. jun.* 519. See also *Buxton v. Sidebotham*, *ibid.* 520, *in notis*, and 1 *Ves. jun.* 213.]

[Where a tenant under a void lease makes great improvements, with the knowledge and approbation of the landlord, he is entitled in equity to a valid lease. *Semb.* 1 *Anstr.* 186.]

[An action being brought upon bills of exchange given by mistake, and a bill for discovery and relief, to have them delivered up filed: on trial at law the defendant obtained a verdict. He then proceeded with the cause in equity, by putting the judgment on record by a supplemental bill. Held entitled by a decree to have the bills delivered up, altho' by the judgment at law they could not be enforced. *Lisle v. Liddle*, 3 *Anstr.* 649.]

[Tenant covenanting to repair, *damage by fire only excepted*, continues liable to the payment of rent, altho' the premises are destroyed by fire, and equity will not relieve him. *Hare v. Groves*, 3 *Anstr.* 687.]

[Where a man sells his interest to procure another an office of trust, or service under the crown, it is a contract of turpitude, and cognizable by the jurisdiction of equity. *Whittingham v. Burgoyne*, 3 *Anstr.* 900.]

[Tenant covenanting to keep and leave the premises in repair, must re-build in case of fire. *Pym v. Blackburne*, 3 *Ves. jun.* 38.]

[A party bound to elect between two funds, having mortgaged one, elects the other; the former must be taken subject to the mortgage, but shall be reimbursed by the latter. *Rumbold v. Rumbold*, 3 *Ves. jun.* 65.]

[The court will decree a specific chattel to be given up, without measuring the value, where damages can be no compensation for it. Here defendant retained possession after the expiration of a limited time, for which he had received it on a special trust, and an express engagement to restore it; and an action had been rendered ineffectual by the release of two of the owners combining with the defendant. *Fells v. Read*, 3 *Ves. jun.* 70.]

[Bond given for a certain sum, which was calculated to be the amount of a residue of a personal estate. It turned out, that the sum was miscalculated. Bill to have the bond considered as a security only for the real sum dismissed. *Burt v. Barlow*, 3 *Bro. C. C.* 451.]

[Charge proportioned to the value of the estate. *Wardell v. Wardell*, 4 *Bro. C. C.* 286.]

[Bill by tenant in tail in reversion to have timber cut, ordered; and that the money be laid out in the funds, and the claims discussed, when tenant in tail came of age. *Mildmay v. Mildmay*, 4 *Bro. C. C.* 76.]

[A creditor had five bonds, one of which had been paid before the bill filed; afterward there was a decree, that the specialty creditors

ors should abate in proportion; he shall not be called upon to bring back what he has received, but shall only abate on the *outstanding* debt. *Louthian v. Hasel*, 4 Bro. C. C. 167.]

[By marriage settlement, 4000 l. was to be laid out to the use of the wife for life, with remainder, in case she should survive, to her, and if the husband should survive, then to such uses as the wife should appoint; in default of appointment to such person as the same would have gone unto by the statute of distributions in case the wife had died unmarried. She died without appointment, leaving a daughter: the father gave to the daughter a real estate in fee, in performance of the covenant. This held to be a case of election; but the daughter electing to take under the will held to take the personality as next of kin. *Hoake v. Barnes*, 3 Bro. C. C. 316.]

[A joint-creditor by simple contract may go against the assets of a deceased partner, but cannot, before the account, retain separate property of that partner in his possession. *Stevenson v. Chiswell*, 3 Ves. jun. 566.]

[Devise of a copyhold (duly surrendered to the use of the will) to A. and his heirs in trust for B. and his heirs. On the death of B., without heirs, the heir of the trustee has no equity to compel the lord to admit him; and his bill was dismissed without costs. *Williams v. Lord Lonsdale*, 3 Ves. jun. 752.]

[Bill by devisee in remainder to him and his heirs male, of a lease for lives against tenant for life, also entitled in reversion to him and his heirs, to compel him to procure a renewal, one life having dropped; the construction of the will being, that the lease should be kept full, and that 500 l. and no more should be charged thereon for that purpose on the dropping of each life; decreed, that if plaintiff chose to pay the excess, the lease should be renewed; in trust to secure the 500 l. and subject thereto, for the defendant for life, after his decease, to raise the farther sum advanced by the plaintiff for renewal, and the expence of the suit, with compound interest at four per cent. during the life of defendant; and subject thereto for plaintiff in tail male; remainder to defendant in fee; defendant was not allowed to charge the estate with 500 l. towards a fine paid by him on a former renewal without consent of the remainder-man. *White v. White*, at the Rolls, 4 Ves. jun. 24.]

[A general devisee in trust for the testator's widow and children, having received from the widow, who was executrix, on her going abroad to recover part of the property, bonds for a debt from him and his partners to the estate, in settling the affairs of the partnership on the retirement of one partner, who had notice of the trust, delivered to him the bonds to be cancelled without the privity of the *cestui que trust*, continuing to make remittances on that account from the funds of the new partnership; the partner who retired was held not discharged. *Dickenson v. Lockyer*, 4 Ves. jun. 36.]

[The court will not interfere between representatives by changing the nature of the property in the execution of a trust, the object of which has failed. *Croft v. Stee*, at the Rolls, 4 Ves. jun. 60.]

[The Lord Chancellor, and M. R. inclined to think that the legal estate in mortgaged premises passed by a general residuary devise by the mortgagee to A., (who was also executor,) his heirs, executors, administrators, and assigns for ever, on the side of his mother. *Ex parte Sergison*, 4 Ves. jun. 147.]

[A sum

[A sum of money being in court to be laid out in lands, which, when purchased, would be subject to the bond-debts of the testator, the debts decreed to be paid out of the fund in court. *Cattel v. Money*, 3 Bro. C. C. 256.]

[Of the doctrine of election, see 3 Bro. C. C. 285. *in notis.*]

[The plaintiff's (testator's) property in *America* being confiscated, subject to his debts, a creditor there ought first to apply to make that property available to the payment of his debt, before he sues him personally here. *Wright v. Nutt*, 3 Bro. C. C. 326. See also *Cottin v. Blane*, 2 Anstr. 544.]

[A partner, after the partnership ceased, gave a joint note. Bill filed to strike out the plaintiff's (the former partner's) name, have the bill retained for a year, and a trial had; when the plaintiff at law could not prove the partnership, and was nonsuited: yet the Lord Chancellor (on equity reserved) refused to decree the name to be erased. *Ryan v. Mackmath*, 3 Bro. C. C. 15.]

[A charge was made raisable, when *A.* or his issue should come into possession: a jointress, who had an estate for life, conveyed to a trustee, in order to enable *A.*, who was tenant in tail in remainder, to suffer a recovery, which he did; having such an interest as enabled him to suffer a recovery, held to be coming into possession within the terms of the deed, and to make the charge raisable. *Hill v. Broughton*, 3 Bro. C. C. 180.]

[A creditor by bond cannot stand his own insurer, and charge the premium to his debtor. *Hutchinson v. Wilson*, 4 Bro. C. C. 488.]

[When equity is equal between the parties, the legal title must prevail. 1 Term Rep. 214. 3 Term Rep. 414.]

[Of late years, the action for "money had and received" hath been much encouraged by the courts of common law, so as to give relief in cases which were formerly thought to be proper for a court of equity only. See *Cowper* 199. 795.]

[Executor may dispose of a lease for years, as assets, notwithstanding a covenant that lessee shall not alien. *Seers v. Hind*, 1 Ves. jun. 295.]

An executor in *India* passing his accounts in this court, is entitled to the commission on the receipts or payments, according to the practice in *India*. *Chetham v. Lord Audley*, at the Rolls, 4 Ves. jun. 72.]

[Tho' a residue be specifically given, the bank has no right to restrain the executor from transferring the funds. *Bank of England v. Moffat*, 3 Bro. C. C. 260.]

(3 G) Executor.

(3 G 1.) Stands in the Place of the Testator.

Chancery will decree an interest vested in the testator to his executor, tho' he is not named; as, if a legacy is given to *A.*, and if he dies under age, to *B.* and *C.*, or the survivor; *B.* and *C.* die, and then *A.* dies under age; the legacy shall be decreed to the executor of the survivor. *R. 2 Vent.* 347.

If a bond is upon condition to pay money to *A.* upon such a day, and he dies before the day: it shall be paid to his executor or administrator. 3 Leo. 212.

If

If an executor makes a lease, rendring rent, his administrator shall have the rent, and not the administrator *de bonis, &c.* 1 Ver. 94.

If a bond is given to pay a sum of money, for owelty of partition, to the other parcener; the executor or administrator of the obligee shall have it, and not the heir. 1 Ver. 133.

If money is paid to the remembrancer in the *Exchequer*, who embezzles it, a bill lies for relief by his successor against his executor. *Ca. Ch.* 300.

If goods are devised to be sold for the purchase of lands for *A.*, who dies without issue before the purchase made; the executor of *A.* shall have them. 1 *Ch. R.* 204.

If a term is vested in trustees for payment of 1000 *l.* to *A.* his eldest son, and every other child not married or provided for; *A.* was then married and had 40 *l. per ann.* for the life of his father, but no other provision, and died before his father; the executor of *A.* shall have the 1000 *l.* 1 *Ch. R.* 258.

But if upon an assignment of a statute to the conusor by the administrator *de bonis non* of the conusee, the conusor covenants to pay the money to him, his executors or administrators, and the administrator dies, the money shall be decreed to the executor of the administrator, and not to a new administrator *de bonis non*, &c. no debts of the first intestate appearing to be due. 2 *Vent.* 362.

So, if a man is bound to pay money to such person as *A.* by will shall nominate, who does nominate, but makes *B.* his executor; *B.* shall not have the money; for it ought to be an assignee in fact that shall take. *R. Hob.* 9.

(3 G 2.) What Things he is compellable to do in Equity.

An executor is compellable in *Chancery* to pay legacies. *Vide post.* (3 Y 3.) *P. W.* 575.

[And if an executor promised his testator to pay certain legacies, and for that reason they were not inserted in the will, he shall be compelled to pay them out of assets. *Ambler.*]

[If *A.* puts his will in his nephew *B.*'s hands, his executor and residuary legatee, with intention to reconsider it, which he does before a witness; his nephew *C.* reminds him of 100 *l.* he intends to leave him: *A.* allows it, desires *B.* to pay it, who promises it, and offers his bond or note for it, and again after *A.*'s death promises to pay it; *B.* shall be decreed to pay it, not personally, but out of assets, and a debt due from *A.* to *C.* shall be deducted, being deemed satisfied by implication. *Reech v. Kennegal, M.* 1748, 1 *Ves.* 123. 1 *Will.* 227.]

[If an executor pays all legacies but one, and never exhibits an inventory, his representative, admitting assets of him, shall pay that legacy. *Orr v. Kaines, H.* 1750, 2 *Ves.* 193.]

If he is guilty of a *devastavit*, his executor or administrator shall be liable (if he has assets) to the debts of the first testator, to the quantum of the goods wasted. *Ca. Ch.* 257.

If any one administers without authority, the executor shall be compelled to allow all payments to which he himself would have been liable. *R. Ca. Ch.* 33.

A fortiori such payments shall be allowed to an executor *de son tort.* *Ibid.* 6 If

If money is to remain in the hands of an executor till payment to infants, when of full age: *Chancery* will compel him to give security for it.

And to pay interest. 2 *Ca. Ch.* 152. *Vide post.* (3 *S.* 4, 5.)

[If a term for years and personal estate is devised to *A.* an infant, and if he dies, and his mother has no children, to *B.*, and *A.* dies; tho' the mother is living, and may have a child, yet the court will direct an account and discovery of the estate, to secure it to *B.* in case the contingency happens. *Studholme v. Hodgson*, *T.* 1734, 3 *P. W.* 300.]

[If one charges the residue of his personal estate with an annuity to his wife, payable quarterly, the court will order the executor to bring securities before the master, to be set apart to answer it, tho' usually when the will does not require security, neither does the court. *Slanning v. Stiles*, *M.* 1734, 3 *P. W.* 334.]

[The court will not take the assets out of the hands of an executor by appointing a receiver, because the executor is poor, if no appearance of fraud. *Hathornthwaite v. Ruffel*, *H.* 1740, 2 *Atkyns*, 126.]

[But if the executrix is a *feme-covert*, whose husband was in *England* at the making of the will, but at testator's death in the *West Indies*, and in bad circumstances, the court will appoint a receiver. *Taylor v. Allen*, *M.* 1741, 2 *Atkyns*, 213.]

[If there has been a verdict at common law against a will, on account of the testator's insanity, and the executor insists, that such verdict affecting the real estate only, he may still support the will in the ecclesiastical court, and gather testator's assets; this court will order the executor to pay in what he has received to the bank, to the account of the accomptant-general, and will appoint a receiver to pay into the bank with accomptant-general's privity, whilst the validity of the will is contesting in the commons. *Montgomery v. Clark*, *M.* 1742, 2 *Atkyns*, 378.]

[If executor be insolvent, the court will, on petition, appoint a receiver, and compel the executor to allow his name to be used in bringing actions. *Utterton v. Mair*, 2 *Ves. jun.* 97. 4 *Bro. C. C.* 270. *S. C.*]

[If *A.* is entitled by covenant of *B.* to 2000*l.* after the death of *B.*'s widow and executrix, who has an interest for life in the fund out of which it is to come, she shall be obliged to set apart the fund in her lifetime. *Johnson v. Mills*, *T.* 1749, 1 *Ves.* 282.]

[On a bill by heir at law to contravert a will of real estate, the court will not appoint a receiver, because there is a dispute in the ecclesiastical court concerning the probate. *Knight v. Dupleffis*, *M.* 1749, 1 *Ves.* 324.]

[So, if he receives money put out upon mortgage, he shall be compelled to place it out at interest. 2 *Ca. Ch.* 21.

So, if he compels payment, and places the money out at interest, he shall account for the interest, tho' he takes the security at his peril. *R. cont.* 2 *Ca. Ch.* 21. *R. acc.* 2 *Ca. Ch.* 152.

Otherwise, where he is compelled to receive it. 2 *Ca. Ch.* 21.

[If an executor admits assets, the decree shall be personal against him; if the fund has been out at interest, for interest also; and if he has misbehaved, (as if he has obtained a release without a consideration,) for costs also. *Horsley v. Chaloner*, *M.* 1750, 2 *Ves.* 83.]

[Unless

[Unless he makes a case to the contrary; as, that a banker, in whose hands the money was, broke. 2 *Ves.* 83.]

So, if a terre-tenant suffers a rent-charge to be in arrear, his executor shall be compelled to the payment of the arrears if he has assets: for tho' the person of the testator was not liable for a rent, which was recoverable only by distress, yet his personal estate was augmented by the non-payment. *R. Ch.* 121.

If an executor is indebted to the testator, tho' the debt is released, by law, equity will enforce payment by the executor, for the discharge of debts or legacies.

So, it will enforce payment to the residuary legatee. *R. Ca. Ch.* 292.

So, it will enforce payment of debts on simple contract, if the executor has assets, tho' the executor is not liable by common law. *R. Mo.* 556.

[If *A.* gives bond to *B.* for payment of money at her death in nature of a legatary disposition, and dies, and *B.* obtains judgment against *A.*'s executor *C.*, who pleaded *non est factum*; *C.* shall pay principal and interest, whether he had assets or not, as if he had confessed judgment, or let it go by default. *Ramsden v. Jackson, H.* 1737, 1 *Atkyns*, 292.]

[A voluntary bond shall be postponed in equity to simple contract debts. *Ib.*]

[If a bond is claimed in consideration of money lent, and the obligee fails in proving the consideration, he shall not afterwards set it up as a voluntary bond. *Ibid.*]

[An executor is not compellable in equity nor law to take advantage of the statute of limitations against an otherwise just demand. *Norton v. Frecker, H.* 1737, 1 *Atkyns*, 524.]

[If there has been no demand for the arrears of an annuity left by will for twenty-two years after the annuitant's death, the court will not compel the executor to pay them; the statute of limitations holds as to an annuity, tho' not as to a legacy. *Smallman v. Hamilton, M.* 1740, 2 *Atkyns*, 71.]

[If a creditor brings bill, obtains a final decree, master's report confirmed, and then another creditor does the same, the executor ought to have paid first him who used the first diligence, as at law the creditor who obtains the first judgment shall be preferred; but as to legacies it is otherwise, for they shall be paid *pari passu*; for there is no priority in them. *Ashley v. Pocock, M.* 1744, 3 *Atkyns*, 208.]

[Payment of interest on a legacy, from time to time, shall be evidence of assets; thus, if a man leaves 500*l.* the interest to be paid to five persons for twenty-one years, if they so long live, and then to a charity, and the executors pay the interest, and the husband of one of them pays her proportion of it after her death, and they exhibit no inventory, the husband and the other executor shall pay the 500*l.* *Corporation of Clergymen's Sons v. Swainson, H.* 1747, 1 *Ves.* 75.]

So, if an executor joins in the probate of a will, and afterwards the other executor only acts; he shall be aided in equity against a sentence in the ecclesiastical court, which charges both for the payment of a legacy. *Semb. Ca. Ch.* 200.

[But a joint executor and residuary legatee shall make good a legacy out of his moiety of the surplus, tho' he had left the money in the

the hands of the other executor and residuary legatee, from whom the legatee had received interest before his bankruptcy, and a dividend out of his estate afterwards. *Spendlove v. Aldrich*, M. 1 G. 2. Ld. Raym. 1320.]

[An executor who is a bond-creditor is not obliged to discharge his bond piecemeal as assets come in, and he may discharge all other demands on testator before his own; therefore he shall be allowed interest till it appears he had sufficient in his hands to discharge his bond entirely, over and above all other demands. *Robinson v. Cumming*, T. 1742, 2 Atkyns, 409.]

[If executors have obtained probate of will, by consent of the next of kin by imposing on him, and the will is found forged by verdict, this court will order the executors to stand as trustees for him. *Barnesley v. Porvel*, T. 1749, 1 Ves. 284.]

[But if there appears a prior will, the court will order the executor to consent to a revocation of the probate, that then the other may be propounded, and if that is not done, they shall consent to administration being granted to next of kin. *Ibid.*]

[And in the mean time will order an account of the personal estate and that it be paid into the bank for the benefit of those entitled. *Id.*]

[If A. settles a plantation in America to trustees, to the use of two Mulattos, his natural children, their heirs, &c. they paying to another Mulatto 500 l. with a clause obliging himself, his heirs, executors, &c. to warrant said plantation, and the stock thereon; and afterwards ejectment is brought against him for the plantation, which he defends, but is evicted, and then brings ejectment in his own name, but compromises, and conveys for 1000 l. which he receives, and continues to manage the whole as his own; and after his death bill is brought against his executor for satisfaction of assets, not following the subject itself, plaintiff shall have satisfaction for the value of the plantation as it stood at the time of sale, and the stock as it stood at the death of A. according to the value at the time of eviction, and English interest on it from his death. *Williamson v. Codrington*, T. 1750, 1 Ves. 511.]

[An infant legatee filed a bill for an account against two executors, one of whom had not proved, and denied having received any assets, The account was directed against both. *Price v. Vaughan & al.* 2 Anstr. 524.]

[Executor keeping money of testator in his hands liable to interest, and costs; lord chancellor said, if he had laid it out in the 3 per cents., the court would have affirmed his act. *Franklin v. Frith*, 3 Bro. C.C. 433.]

(3 G 3.) How he shall pay Legacies.

[3 G 3.] *When a legatee shall refund, and when not.*] An executor need not pay a legatee, without security to refund, if the assets fail. *Ca. Ch.* 137. 257.

And he shall refund to creditors, and also to other legatees; for if the assets fail, the legacies shall be paid in proportion. 2 Vent. 358. 360. 1 Ver. 94. 1 Ch. R. 134. 2 Ver. 205. 2 Ch. R. 137.

And if the spiritual court decrees payment, without security for refunding, a prohibition shall go. 2 Vent. 358. *Ca. Ch.* 258. 1 Ver. 93.

V. l. II.

Kk

So,

So, if by a decree of *Chancery* a legatee is paid, and afterwards debts are discovered, he shall be compelled to refund. *2 Vent.* 358. *R. Ca. Ch.* 136. *2 Ver.* 205. *Vide 2 Ch. R.* 137.

So, if the executor of an executor, who has made a *devastavit*, pays a legacy of his testator, and then, upon an account, the first executor appears to have wasted the goods of the first testator; the legatee shall be compelled to refund to a creditor of the first testator, upon a bill against the executor of the executor (who was insolvent) and the legatee. *R. 2 Vent.* 360. *1 Ver.* 162.

Otherwise, if the bill was brought by the creditor and the executor of the executor against the legatee; for the executor shall not reverse his own assent. *R. 2 Vent.* 360.

But if an executor assents to a legacy, without requiring security to refund, if debts are afterwards discovered, and the assets fail, he shall not compel the legatee to refund. *R. 1 Ver.* 94. 453. 460. *2 Vent.* 358. 360. *R. cent. Ca. Ch.* 136. 257.

So, if he pays a debt due by simple contract, before a debt by specialty: the creditor shall not be compelled to refund. *2 Vent.* 360.

So, if an executor assents to a devise of a term for years, and the devisee sells it *bonâ fide*; the creditors cannot compel the vendee to refund. *R. Ca. Ch.* 257.

So, if an executor pays a legacy, and afterwards assets fall short for the other legatees; the first legatee shall not be compelled to refund. *Semb. Ca. Ch.* 136. *2 Ver.* 205.

[If an executor pays a legacy voluntarily, he is presumed to have sufficient to pay all, and shall not oblige the legatee to refund; but if executor proves insolvent, the other legatees may compel the one paid to refund. *Orr v. Kaines*, *H.* 1750, *2 Vef.* 193.]

[Residuary legatee paid by executor without fraud, shall not be obliged to refund to legatees who were to be paid at a future time. *Moore v. Moore*, *T.* 1755, *2 Vef.* 596.]

A specific legacy, or tum, actually paid, shall be refunded as well as another. *Ca. Ch.* 257.

So, if a devise is that the executor do assign land of 100 *l.* value to *A.*, and gives legacies out of lands sold to others; and land of above 100 *l.* value is assigned to *A.*, by reason of which the assets fall short for the other legatees; *A.* must refund. *R. 2 Ca. Ch.* 25.

[Assets sufficient to pay all debts and legacies; the legatees receive payment, as the creditors also might have done, if they had demanded it in time; they lie by for eleven years, and the estate is wasted, yet the legatees shall refund. *Hardwick v. Mynd*, *1 Anstr.* 112.]

When legatees abate, *vide post.* (3 Y 18, 19.)

[If testator leaves large sums in legacies, and directs his corpse to be buried at a distance, the court will not adhere to the law rule of allowing but 10 *l.* for funeral charges. *Stag v. Punter*, *T.* 1744, *3 Atkyns*, 11. 9.]

(3 G 4.) What is an assent to a legacy, *vide Administration*, (C 5, &c.)

Neither residuary nor specific legatees have any interest without the assent of the executor; till then he has the interest in him, and not a bare authority only. *Mead v. E. Orrery*, *T.* 1745, *3 Atkyns*, 235.

[If a term is devised to *A.* for life, remainder to *B.*, and the executor assents to the devise to *A.*, it is an assent to the devise over. *Adams v. Pierce*, *T.* 1724, *3 P. W.* 11.]

If the executor demises a term in trust for a legatee, this shall be a sufficient assent. *R. 2 Vent. 358. 1 Ver. 94. 453.*

If an executor refuses to assent, he shall be compelled thereto in equity. *1 Ver. 94.*

(3 G 5.) *When he shall take as a legatee.*] If an executor is residuary legatee, and dies before election made to take as legatee, yet the residue shall be distributed as his own estate; for the court will make the election for him. *R. Ca. Ch. 310.*

But if a man devises his personal estate to his wife, and makes her executrix, she shall take as executrix. *R. 2 Ver. 302. 309.*

[If the testator appoint his executor also trustee, that shall not bar his taking an undisposed residue. *2 Brown, 31.*]

[But where the testatrix by will made trustees, and gave them legacies, and by codicil appointed them executors, and ordered them to be paid for journies and expences, this was held to shew an intention to make them executors in trust only. *2 Brown, 634.*]

[So, having an annuity for collecting rents, turns the executor into a trustee. *Id. 156.*]

[But where there are several executors, some of them having legacies does not turn them into trustees. *Id. 220.*]

[An executor, who died before probate, was held entitled to a legacy given for his care and loss of time in the execution of the trusts of the will, by having concurred with the other executors in directions for the funeral, and in paying some small sums on that occasion. *Harrison v. Rowley, at the Rolls, 4 Ves. jun. 212.*]

[Executor not entitled to his legacy, without proving the will. *Read v. Devaynes, at the Rolls, 3 Bro. C. C. 95.*]

Vide post. (3 G 7.)

(3 G 6.) *What payment will be safe. By direction of the court.*] The most safe way for payment of legacies by an executor, is to take the direction of the court of Chancery.

If an executor pays a legacy without the direction of the court, and afterwards assets are evicted; he shall not be relieved against the legatee, nor compel him to refund. *R. 2 Ca. Ch. 9. Vide ante, (3 G 1.)*

So, if assets afterwards fail to answer all the other legacies fully, he shall answer out of his own money, so much as the first legatee is paid beyond his proportion. *R. 2 Ca. Ch. 132.*

Tho' that legatee was to be paid in the first place. *Semb. 2 Ca. Ch. 132.*

So, an executor may exhibit a bill against all the creditors, to settle their debts, and which of them are to be preferred. *R. upon Demurrer, 2 Ver. 37.*

But payment to the father of an infant, where the legacy is not of value to support the charge of a decree, shall be good, tho' the father afterwards fails. *Ca. Ch. 245.*

A fortiori, if he takes security from the father to pay the infant. *Id.*

Otherwise, if he takes security for his indemnity; for then he pays at his peril. *Ibid.*

[If an executor pays a considerable legacy (as 100*l.*) into the hands of an infant, he shall not be allowed it; if it is a very small one, he may. *Philips v. Paget, M. 1740, 2 Atk. 81.*]

[Legacy payable at 21, with 5 *per cent.* till payable : executrix advanced a sum larger than the legacy, by discharging disbursements all paid *bonâ fide* for the infant, tho' some were improper. Legatee, when of age, assigned the legacy. Assignee held entitled against executrix to the legacy, with 4 *per cent.* from the time it was payable. *Davis v. Austen*, 1 *Ves. jun.* 247. 3 *Bro. Ch. Ca.* 178. S. C.]

[Executor, or administrator, where there are debts, may sell the testator's term specifically devised; and even in suspicious circumstances of fraud, after long possession by the purchaser, or the person under whom he takes, the court will not relieve. *Andrew v. Wrigley, at the Rolls*, 4 *Bro. C. C.* 125.]

[So, if an executor do not well appropriate a legacy, he shall make good any deficiency that may happen; as where a legacy was left to A. on marrying with consent, and, till marriage, interest to be paid at 3 *l. per cent.* the executrix lays it out in the funds, and conveys to trustees in trust to pay the legacy, with 3 *l. per cent.* interest, and to pay the surplus interest to her; this is not a good appropriation, for the executrix had no right to the surplus interest; and the stock having sunk in value, the estate of the executrix shall make good the deficiency. 2 *Brown*. 231.]

So, payment of a legacy, where each legatee ought to be paid out of a proper fund, is good; tho' the fund of others afterwards fails; for each shall sustain the loss which happens to his particular fund. 2 *Ca. Ch.* 132.

(3 G 7.) *When he shall be a residuary legatee.*] If a man makes his executor, and says nothing as to the residue of his personal estate; it goes to his executor. *R.* 2 *Ver.* 104. *R. Eq. Ca.* 28. *Admitted* 1 *P. W.* 554.

So, if a man gives a legacy to his executor, without mention that another shall have the residue; his executor shall have it. *R.* 2 *Ver.* 677, 8. *R.* 2 *Ver.* 737.—*Cont.* 2 *Ver.* 361. 425. *R. Eq. Ca.* 12. *Cont. Pr. Ch.* 170.

[If testator makes his wife sole heiress and executrix of all his real and personal estate, to sell and dispose thereof at her pleasure, and to pay his debts and legacies, and gives his heir at law 5 *l.* the wife has the residue to her own use, and there is no resulting trust to the heir. *Rogers v. Rogers*, T. 1733, 3 *P. W.* 193. C. T. T. 268.]

[If A. gives legacies to her children, and then directs 1000 *l.* of her partnership stock to be strictly settled on her son, and gives the residue of partnership stock to trustees, for the separate use of B. a *feme-covert*, and makes her executrix, but makes no disposition of the surplus, B. shall have it. *Newstead v. Johnston*, T. 1740, 2 *Atkyns*, 45.]

[Tho' executors have legacies, one 200 *l.* the other 100 *l.*; yet if it is proved that testator always declared that he would not leave any thing to next of kin, the executors shall have the residue. *Bradbridge v. Woodroffe*, M. 1740, 2 *Atkyns*, 68.]

[A legacy to an executor for mourning for himself, wife, and children, does not exclude him from the residue, especially if there are two. *Buffar v. Bradford*, M. 1741, 2 *Atkyns*, 220.]

[If A. by will gives B. and C. infants, particular specific legacies by

by name, and makes them joint and sole executors, they shall have the surplus; for the specific legacies might be intended for an inequality of division among them, and also to give each a distinct interest, not liable to survivorship. *Blinkhorn v. Feast*, M. 1750, 2 *Ves.* 27. 1 *Will.* 285.]

[If a man makes his wife and A. executors, gives his wife specific legacies, and makes her residuary legatee, and to A.'s wife gives a real estate in fee, and testator's wife dies in his lifetime, the residue goes to A. surviving co-executor. *Wilson v. Ivat*, H. 1750, 2 *Ves.* 166.]

[Wife executrix, tho' testator devises to her money and land, yet on parol proof of his great affection to her, and his intention, may have the residue. *Lake v. Lake*, M. 25 G. 2. 1 *Will.* 313.]

Tho' he devises a legacy to his executor after all other legacies. R. 2 *Ca. Ch.* 187.

Tho' the executor is his wife or other relation. 2 *Ver.* 649. 678.

[If a husband is left sole executor, he is entitled to the surplus. *Partridge v. Pawlet*, H. 1736, 1 *Atkyns*, 467.]

But a legacy given to the executor for his care or trouble, excludes the executor, unless he be expressly named residuary legatee, from the residue of the personal estate, after debts and other legacies paid; for in such case the residue shall be distributed according to the *fl.* 22 & 23 *Car.* 2. for the Distribution of Intestates' estates. R. 1 *Ver.* 473. R. 2 *Ver.* 674. *Adm.* 2 *Ver.* 677. 2 *Ver.* 737. R. *Eq. Ca.* 10. R. 1 *P. W.* 9. 550. *Eq. Ca.* 209. [2 *Ves. jun.* 473.]

[If testator gives his executor 5*l.* for his trouble, the surplus shall be distributed. *Rusdell v. Carneffe*, T. 9 G. Str. 568.]

[If testator gives executor a legacy for his trouble, and also an express legacy to the next of kin, yet the surplus shall go according to statute of distributions. *Davers v. Deaves*, T. 1730, 3 *P. W.* 40.]

[Where executors are made trustees, they can take nothing for their own benefit, unless particularly given them; and having no ownership, cannot alter the interest of the *cestuy que trusts*. *Reed v. Snell*, T. 1743, 2 *Atkyns*, 642.]

[If a man gives an annuity to his executor, the first payment to be made the first quarter-day after testator's death, whether that will exclude him from the surplus? *Dub. Southcot v. Watson*, T. 1745, 3 *Atkyns*, 226.]

[But if he gives him an annuity, and then all his household goods and furniture, (three pictures excepted,) and all his plate, linen, watches, jewels, and clothes whatsoever, this excludes him from the residue. *Dub. Southcot v. Watson*, T. 1745, 3 *Atkyns*, 226.]

[Where a necessary implication or violent presumption appears, that testator by naming executor meant only to give the office of executor, and not the beneficial interest or property, he shall be considered as a trustee, and a resulting trust for the next of kin to the testator. *Bishop Cloyne v. Young*, M. 1750, 2 *Ves.* 91.]

[So, if A. makes B. and C. his executors, and as to his personal estate, &c. gives B. a mortgage on B.'s estate, to be divided among

his children, and gives C. a bond due from B., and then gives the residue to —, the next of kin shall have it. 2 *Ves.* 91.]

[If a man gives 1 s. a-piece to his brother and sister, and 50 l. a-piece to his executors; this devise of 1 s. shall not prevent their having the residue as next of kin. *Andrew v. Clark*, H. 1750, 2 *Ves.* 162.]

So, if a man devises the rest of his goods and chattels to his executor, and gives him 100 l. for his care, and then says, *the rest of my personal estate to A.*, A. shall be the residuary legatee of the goods, as well as of the other personal estate. R. 1 *Ver.* 30.

So, if the executor submits to account for the residue having his legacy, tho' it was by surprize. 1 *P. W.* 298. 300.

[The general rule of law is that where there is no residuary legatee, nor any thing appearing on the face of the will to shew that the testator meant to exclude the executor from the residue the executor takes all. *Bowker v. Hunter*, 1 *Brown Rep. Ch.* 328.]

[But a legacy given to him as executor, or by express words for his care and trouble, or in any other way which shews the testator meant he should have no more, excludes him from the surplus. *Id. ibid.*]

[But if there be two executors and one of them has a legacy and the other not, this does not exclude either, for it shews that he who has the legacy, had it not as executor in satisfaction for his trouble. *Id. ibid.*]

[So also, on the same principle, where unequal legacies are given to executors, by their own names, they shall nevertheless take the residue. *Id. ibid. Vide etiam 2 Brown*, 31. 156. 220. 634.]

If a man devises 800 l. to his executor upon trust to pay several annuities, the residue of his personal estate to A.; the surplus of the 800 l. after the annuities satisfied shall go to A. 1 *Ver.* 425, 426.

If a man devises 20 l. to his executor, and desires him to take the trouble of his will, and gives all that he has in legacies, but afterwards acquires a larger personal estate; the surplus shall be in trust for the legatees in proportion. R. 2 *Ver.* 149.

If a man devises his plate to his wife for life, and afterwards to his son, and makes his wife executrix, but says nothing of the residue; it shall be distributed. R. 2 *Ver.* 650. R. 2 *Ver.* 674. R. cent. 2 *Ver.* 677. *Vide infra.*

[If testator after several legacies devises the residue to his wife for life, and she devises to A., the residue of the husband's personal estate shall be distributed. *Joslyn v. Brewett*, T. 1722, *Funb.* 112.]

So, an absolute legacy, if it lapses by the death of the legatee, shall not go to the residuary legatee, but shall be distributed. 2 *Ver.* 395.

Or, it goes to the executor, where the benefit of the whole was given to him for his life. *Temp.* 5 G. 2. 12.

[If a man by a *French* will institutes for his universal heiresses his sister A. for one-third, his sister B. for one third, and as to the other third, the profits to A. for life, and then to the children of his brother C., and makes D. executor; A. dies in testator's life, her third does not go to the executor, but shall be divided in thirds between

tween *B.* and *F.* testator's sisters, and the son of *C.* *Androvin v. Pailblanc, H. 1745, 3 Atkyns, 299.*]

If a man gives a legacy to *A.* and another to his executor, and dies before he devises over; the residue of the personal estate shall be distributed. *R. Eq. Ca. 184.*

[If *A.* devises her worldly substance to *B.* to be paid at twenty-one or marriage, if she marries with consent, or if she dies before, then to —, and makes *C.* executor, heartily requesting him to be so kind as to take the execution, and *B.* dies under age and unmarried, the next of kin shall have it. *Lord North v. Purdon, T. 1752, 2 Ves. 495.*]

The residuary legatee may demand an account against the executor. *2 Ca. Ch. 35.*

So, against every one to whom money of the testator is payable. *2 Ca. Ch. 57. Vide ante, (2 A 1.)*

And the executor shall account for all interest received by him, as well as the principal, to the residuary legatee. *R. cont. 2 Ca. Ch. 35.*

If an executor compounds a debt or mortgage, the advantage tends to the benefit of the residuary legatee, and not of himself. *R. 1 Sal. 155.*

If a legacy is given to *A.* upon the contingency of his returning from *France*, &c. and he dies before; it will go to the residuary legatee, the condition precedent, upon which it is given, not being performed. *R. 2 Ver. 394.*

If a man devises the use of his plate to his wife for life and makes her executrix; she shall have the residue. *Cont. per Cowper, but reversed in the House of Lords, 1 P. W. 115. 2 Ver. 648. 675. 1 P. W. 552. Vide supra.*

[If a man makes his will in *French*, of all his estate, and says, "my daughter *M.* is very ill; if she dies, I leave my wife the revenue; if she lives, her dower only; I give my daughter *M.* the residue;" then, if she dies without *enfants*, gives pecuniary legacies, and concludes, "to my brother *ce que se trouvera*;" and *M.* survives testator, but dies of that illness, (a cancer,) without issue; *enfants* signifies children, and not issue, therefore the wife has the usufructuary interest for life, and *ce que se trouvera* is a sufficient residuary bequest to the brother. *Duhamel v. Ardovin, H. 1750, 2 Ves. 162*]

[Residuary legatee dying in the lifetime of the testator, the executors, tho' no legacy to them except 10*l.* to one for mourning, are trustees of the residue for the next of kin. *Bennet v. Batchelor, 1 Ves. jun. 63. 3 Bro. Ch. Ca. 28. S. C.*]

[Executor has a specific legacy; residue unbequeathed by the will; codicil disposing of it, but with blanks for names, &c. not filled up, and unexecuted, found with the will; and contradictory evidence of intention: he is held trustee of the residue for the next of kin. *Nourse v. Finch, 1 Ves. jun. 344. and Hornsby v. Finch, 2 Ves. jun. 78. On rehearing, 4 Bro. C. C. 239. S. C. See also Holford v. Wood, at the Rolls, 4 Ves. jun. 76.*]

[A legacy will not take away executor's right to the residue, unless inconsistent with the supposition that he is to take the whole. *2 Ves. jun. 80.*]

[Executor is entitled to the residue, unless there be a strong and violent presumption against him: a legacy to him affords such presumption, but parol evidence of the intention is admissible to rebut it, and is not to be confined to the time of making the will, but it must go to shew the intention at that time only. Decreed accordingly *per M. R. Clonell v. Lewthwaite, and Thornton v. Tracy*, 2 *Ves. jun.* 465. Decree affirmed by Lord Chancellor, *ibid.* 644.]

(3 G 8.) What Relief an Executor shall have in Equity.

An executor shall be relieved in equity. *Vide Administrator, ante*, (2 B 1, 2.)—*Devise, ante*, (3 A 1, &c.)

To a bill brought by an administrator, it may be pleaded, *that the deceased made a will and the defendant his executor.* 1 *Ver.* 397.

That the defendant is executor by a nuncupative will made beyond the sea, and no assets here, tho' the nuncupative will is not proved here, for there is no need of it, when made in a foreign country, of an estate there. *R.* 1 *Ver.* 397.

That the plaintiff is not administrator. 1 *Ver.* 473.

So, if *A.* being sued as executor, pleads *ne unques executor*, and there is a verdict against him, because some minute thing, as 2 *d.* or other small sum, was paid to him, and a small part of the goods of the testator delivered to him; he shall be relieved in equity. *R.* 2 *Ver.* 147, 8.

So, if a verdict be against him upon *plene administravit*, upon a confession by him, that he had a mortgage for 300 *l.* when that mortgage was of no value, there being two prior mortgages. *R.* 2 *Ver.* 147.

So, if an executor pay money pursuant to a decree, and afterwards is charged with that money as assets at law, he shall be aided in equity; for the decree was not pleadable at law. 3 *Ch. R.* 3.

[If an executor or administrator with his own money pays judgments beyond the personal assets, it shall be allowed him out of the real assets, before other creditors; but if he pays bond-debts, beyond personal assets, he must come in *pro rata* with other bond creditors for satisfaction out of the real assets. *Robinson v. Tonge*, *M.* 1735, 3 *P. W.* 398.]

So, if *A.* covenants, upon the sale of land to *B.*, that he shall enjoy, or the money paid shall be refunded, and *B.* is afterwards evicted by *C.*, and afterwards *B.* makes *C.* his executor; *C.* shall be aided in equity to recover the money, tho' he himself has the estate; for he has it *en autre droit.* *R.* 1 *Ver.* 284.

If *A.* covenants within four months to settle 100 *l. per ann.* or if he does not do it, that his executor shall pay 2000 *l.* and dies within four months, his executor shall have his election to settle the land or pay the money. *R.* 2 *P. W.* 617.

[If *A.* dies intestate, and his wife possesses herself of all his personal estate, and the son acquiesces for many years, and accepts a legacy under the mother's will, he shall not afterwards bring a bill against her executor for an account of the father's personal estate. *Huet v. Fletcher*, *M.* 1739, 1 *Atkyns*, 467.]

[If one executor is indebted to the testator on mortgage, the co-executors cannot bring a bill to foreclose, but for sale of the estate. *Lucas v. Seale*, *T.* 1740, 2 *Atkyns*, 56.]

[If an executor for the benefit of testator's estate, invests money in the funds, or transfers from one stock to another, he is not guilty of a *devastavit*; this is not a conversion or appropriation, and you may still follow the money as if it continued in its first plight. *Waite v. Whorwood*, P. 1741, 2 *Atkyns*, 159.]

[If a will is controverted in the commons, and both the next of kin, and the executor bring bills, and there is an order for a receiver, in pursuance of which the executor has paid in notes, and the next of kin has possessed himself forcibly of houses; he shall deliver up the possession to the receiver, on the executor's staying proceedings on an indictment for the forcible entry. *Wills v. Rich*, H. 1741, 2 *Atkyns*, 285.]

[If an executor, administrator, or trustee, decreed to account for assets, delivers goods to his solicitor, who is robbed; such executor, &c. shall not be charged, for he was only to keep them as his own. *Jones v. Lewis*, H. 1750, 2 *Ves.* 240.]

[Executors directed with all convenient speed to pay debts, and lay out the residue in mortgages, held not answerable for a loss by the insolvency of the testator's banker, after selling negotiable securities deposited with him by the testator. *Rowth v. Howell*, 3 *Ves. jun.* 565.]

(3 G 9.) What not.

But if an executor or administrator pays debts on specialties to the value of the assets, before notice of a decree; he shall pay the whole due by the decree, and shall not be aided in equity. 2 *Ver.* 37.

[If an executor pay simple contract debts preferable to a bond with notice, he shall pay costs *de bonis propriis* in equity as at law. *Jefferies v. Harrison*, H. 1736, 1 *Atkyns*, 468.]

If he proves the will in the spiritual court, and a legacy is interlined and forged, he shall not be aided in equity; for it might have been reserved in the ecclesiastical court, which has the probate of wills, *quoad* the personal estate. P. W. 388.

[Where an executor does not bring an action in due time to recover money due to his testator on bond, he shall satisfy it from his own property. 2 *Brown*, 156.]

[And if he put the next of kin to prove their relationship, he shall pay the costs arising from that, if they succeed. *Id. ibid.*]

[Where executors join in a draft for the property of the testator, and suffer the money to be in the hand of a tradesman, they are both liable to make good any loss on that account, tho' one of them may have done no other act in execution of the will. *Id.* 114.]

[But a co-executor, who proved, but never acted, held not to be charged by receiving a bill of exchange by the post on account of the estate, and sending it immediately to the acting executor. *Balchen v. Scott*, 2 *Ves. jun.* 678.]

[Testator directed that his business should be carried on by E. P. the executors permitted E. P. to get in the outstanding debts; he not paying over the money to the executors, was taken in execution at their suit; the executors held liable to the residuary legatee. *Pislor v. Dunbar*, 1 *Anstr.* 107.]

[One executor being by a legacy for his care clearly a trustee of the

the residue for the next of kin, the other must be a trustee also. *White v. Evans, at the Rolls, 4 Ves. jun. 21.*]

[Testatrix by will appointed an executor and gave him a legacy: afterwards by a testamentary paper she directed the residue to be disposed of according to private instructions to him, and having by a subsequent codicil added another executor, died, without giving any instructions; the executors held trustees of the residue for the next of kin. *Mordaunt v. Hussey, 4 Ves. jun. 117.*]

[Testator gave his brother and nephew legacies, and appointed them executors, but did not dispose of the residue; they were indebted to him in unequal sums; this held to be no release of the debts, and they are trustees for the next of kin as to the residue. *Carey v. Goodinge, 3 Bro. C. C. 110.*]

[Husband gave the wife an estate for life, and appointed her executrix; she shall not take the residue. *Zouch v. Lambert, at the Rolls, 4 Bro. C. C. 326.*]

(3 H) Exchange.

IF a man incloses glebe amongst other lands improved out of a waste, and allots other land to the parson, as good in quantity and quality, and it is so found upon a commission; it shall be established by a decree. *1 Ch. R. 41.*

(3 I) Fait.

(3 I 1.) When a Discovery shall be enforced.

CHancery will compel the discovery of deeds, or other writings. *Vide ante, (3 B 1, 2.)*

And that, at the suit of every one, who has a right to a deed in the defendant's custody; as, if there is a devise to a wife or daughter, &c. the heir may pray a discovery of a deed of intail, which defeats the devise. *2 Ca. Ch. 4.*

If a deed is discovered to be in the hands of *A.* who suppresses it; there shall be a decree for enjoyment according to the deed. *2 Ver. 380.*

Tho' the defendant denies the deed to be in his custody, if he has confessed it in a former answer. *2 Ver. 380.*

If the defendant says, that in a passion he burnt the deed, but it is proved that he produced it, after the time alleged for the burning of it; he shall stand committed till he either produces it, or admits it to be to the effect in the bill. *R. 2 Ver. 561.*

But a purchaser for a valuable consideration without notice, shall not be compelled to discover a deed for the impeachment of his title, but may plead that he is a purchaser without notice. *Vide ante, (I 1.)*

Nor, a woman who has a jointure, if the jointure is not confirmed.

So, there shall not be a bill for the discovery of a deed, without an affidavit that it is lost; where the court has not jurisdiction, without the deed. *Vide ante, (E 1.)*

Or, if the plaintiff, besides the discovery, prays relief. *Eq. Abr. 13.*
But

But where the bill is for a discovery only, or to have a deed produced at a trial, an *affidavit* is not necessary. *Semb. Eq. Abr. 13.*

Or, if the bill is for the discovery of a lease, without which the plaintiff cannot fix his damages at law, tho' he prays general relief; for that does not import relief in equity, but shall be confined to such relief as was sought by the discovery, to the intent to have relief at law. *Eq. Abr. 14.*

(3 I 2.) When a Deed shall be aided or avoided.

When a deed shall be aided or avoided. *Vide Conveyance, ante, (2 T 1, &c.—Obligation, post. 4 D 1, &c.)*

If a man, upon a displeasure at his son, makes a greater settlement upon his wife, but afterwards cancels the deed; yet the wife, if she finds the deed, shall have advantage of it. *2 Ver. 476.*

[If *A.*, in consideration of love to her niece *B.* grants her personal estate to trustees, to permit *A.* to enjoy during life, then after debts and funerals paid, to the separate use of *B.*, or as she shall appoint, and *B.* dies before *A.*; yet it goes to the representative of *B.*, not to the executor and residuary legatee of *A.* *Peck v. Parrot, P. 1749, 1 Ves. 236.*]

[If a deed is discharged, by payment, &c. the court will compel the delivery of it to the party. *Vide Obligation, (4 D 1.)*

So, of a deed with a power of revocation; if it is revoked pursuant to the power; for the deed of revocation may be lost. *Eq. R. 1.*

[If *A.*, on coming of age executes a deed to *B.* his agent of a reversion of lands for 180 *l.* which was not paid or intended to be paid, it being merely a bounty, and there are covenants proper for a vendor to a vendee, but improper in a grant of a bounty, and there is no fraud, the deed shall not be rescinded, but *B.* shall execute a release of the covenants. *Cray v. Mansfield, H. 1749, 1 Ves. 379.*]

(3 I 3.) When a Deed shall be produced.

If the defendant by his answer offers to produce a deed, known to be in his custody, as the court shall direct; it shall not be produced till the hearing of the cause.

If he pleads, that he himself is a purchaser for a valuable consideration, *as by a deed ready to be produced appears*, he shall not be obliged to produce it to the plaintiff. *Eq. Ab. 36.*

But where the plaintiff is co-heir with the defendant, who having the settlement of the estate in his hands, pretends a devise to him, he shall produce the settlement, before the trial of the will; for a trial will be vain, without producing the settlement, which belongs to the plaintiff as well as to the defendant. *R. Eq. Ca. 99.*

(3 K) Fines.

IF a man has a tenant-right estate, a reasonable fine shall be established by a decree; as, the value of one year upon a moderate estimate. *1 Ch. R. 34. 96.*

[In a beneficial lease the tenant for life renewing, the fine shall be apportioned

apportioned between him and the remainder-man in proportion to their respective interests. 1 *Brown*, 240.]

[Unless a fund be provided, out of which the fines for renewal are to be paid; as, where a man gave his real, leasehold, and personal property (the leasehold consisting of bishops' leases renewable) as a general fund, charged with annuities to trustees to pay rents and profits to *B.* for life, with remainder to *C.*, and directed the leases to be renewed, the fines for renewal are to be paid out of the whole fund, not apportioned between the tenant for life and the remainder-man. 2 *Brown*, 243.]

Vide Fine and Recovery, post. (3 N 1, 2.)

(3 L) Forfeiture.

When it shall be aided, and when not.

Chancery will relieve against a forfeiture by waste upon a copyhold, if satisfaction is made for the waste, and there does not appear an intent to commit the waste. *R. Ca. Ch.* 96. *Vide Copyhold*, (M 3.)

So, against a forfeiture of a lease for years, &c. for non-payment of rent.

And by *st.* 4 *Geo.* 2. 28. a lessee being relieved, shall enjoy according to the lease, without a new lease.

So, if tenant for life, as *cestuy que trust*, levies a fine of the trust-estate, it shall not be a forfeiture of his trust for the benefit of him in the remainder or reversion. 2 *P. W.* 147.

[If *A.* devises his estates to trustees, to his daughter *B.* for life, to trustees to preserve, &c. to her first son in tail-male, second and others in tail-general, to his daughters of *B.* and *C.* in tail, to *D.* for life, his sons in tail, and to *E.*; and *B.* conveys the reversion in fee, expectant on the remainders in the will, to trustees for certain uses, and covenants to levy a fine *sur concessit* to the uses, and both deed and fine recite the limitations; it is not a forfeiture, but only a fine of the reversion. *Lethieullier v. Tracy*, *M.* 1750, 3 *Atkyns*, 728.]

[If tenant for life of a trust estate with trustees to preserve contingent remainders, levies a fine *sur concessit* of his estate for life, it is not a forfeiture, but would only operate in equity as a grant of such interest as he had power to grant. *Ibid.*]

[If a fine *sur concessit* is levied by tenant for life, reversioner in fee expectant on several limitations, equity will not construe it to work a wrong. *Ibid.*]

But by the *st.* 4 *Geo.* 2. 28. lessee, or any claiming right to a lease, preferring a bill for relief in six calendar months after judgment in ejectment, and execution thereon executed, shall not be restored to possession, unless he pay to the lessor what the profits which he received, or might without wilful neglect have received, fall short of the reserved rent.

So, if a copyholder commits a forfeiture, he shall not be aided.

As, if he makes a lease not warranted by the custom. 2 *P. W.*

147.

So, if an estate is settled in trustees in trust for *A.* for life, afterwards

wards to his wife for life, afterwards to their first and other sons; and *A.* and his wife make a mortgage thereof to *B.*, and levy a fine to him; *B.* shall have it during the lives of *A.* and his wife. 2 *P. W.*

147.

[A man granted two annuities of 100*l.* and 200*l.* to his son, afterwards by will he gave him another annuity of 600*l.* on condition that he should release all demands on his estate arising from accounts relative to money transactions between them; the release tendered included the former annuities; the refusal to execute this was held to be no forfeiture of the annuity by the will; but a release being proposed by a master going only to the account, a refusal to execute this was held to be a forfeiture of the latter annuity. 1 *Brown*, 168.]

(3 M) Fraud.

(3 M 1.) When it shall avoid a Bargain.

FRAUD, accident, and breach of trust, are proper for relief in conscience. 1 *Rel.* 374. 1. 10. 4 *Inst.* 84. *Vide ante* (Z).—*Post.* (4 W 1.)—*Fraudulent Gift of Feoffment, &c.* *Vide in Covenant*, (B 2, &c.)

And therefore, if a man is decoyed by fraud or circumvention to make a disadvantageous bargain, he shall be relieved in equity. *Vide ante*, (2 C 8, 9. 12.—2 T 11.) *Post.* (4 L 1.—4 W 28, 29.)

As, if he is drawn in by art or covin to give 500*l.* for goods of but half that value.

If he gives a bill of exchange for value received, where nothing was paid, and no consideration given. *R.* 2 *Ver.* 123.

Or judgments for great sums, when a small sum was paid. 3 *Ch.* *R.* 10.

If he is drawn in to execute a release, by suppression of the truth, or by a suggestion of a falsehood. 2 *P. W.* 240.

So, if a young gentleman is inveigled to give 500*l.* for goods, which he sells only for 200*l.* *Ca. Ch.* 276.

If an heir apparent gives security to pay 1200*l.* after the death of his father, for goods of 400*l.* value, and if he dies before his father, then to pay nothing. 2 *Ca. Ch.* 137.

[Inadequacy of price in the purchase of an annuity, is not of itself such a presumption of fraud as to set aside the transaction; but if accompanied with other circumstances it may, as if it be so great as to shew that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, it will shew a command over him which amounts to a fraud. 2 *Brown*. 175. See also *Speed v. Philips*, 3 *Anstr.* 732.]

So, if he sells the reversion of land, after the death of his father for a small sum, and an annuity for the life of his father, tho' the sale would be void, if he were to die before his father. 2 *Ca. Ch.* 120. 1 *Ver.* 167. 2 *Ver.* 27. 77.

If upon a loan of 2000*l.* he gives judgment to pay 5000*l.* after the death of his father, or if he marries before. *R.* 9 *Ver.* 15. *P. W.* 312.

So, if he engages in securities with others, upon payment of the whole money, which he received, he shall be aided. *R.* 2 *Ver.* 77. So,

So, if *A.* in the remainder after the death of his uncle, without issue, takes up money by loan, upon an agreement to pay 1000*l.* for every 100*l.* if his uncle dies before him without issue, and afterwards, upon a bill in equity to redeem or to foreclose, submits to be foreclosed, and acknowledges by his answer, that the bargain was fairly made, he shall be relieved upon payment of principal and interest, without costs. 2 *Ver.* 122.

If *A.* offers a mortgage for 1000*l.*, if a scrivener can find him a gentleman, who will advance it, and the scrivener contrives with *B.*, who, as agent for another person, advances 300*l.* only, and supplies wine to the value of 200*l.* for 400*l.* more, and discounts 300*l.* debt with the scrivener, and takes security of *A.* and the scrivener: *A.* shall be relieved, upon re-payment of all that he received, viz. 300*l.* and interest. *R.* 2 *Ver.* 347.

So, if a son, in remainder in tail after the death of his father, sells 150*l.* *per ann.* for 1050*l.*, having issue born. *R.* 1 *P. W.* 312.

So, if *A.* procures a policy of insurance to be subscribed by fraud; a verdict thereupon shall be avoided in equity, with costs. 2 *Ver.* 206.

If *A.*, a devisee by a will not executed according to the *β.* 29 *C.* 2. procures a release from the heir, and a conveyance for a small sum. *P. W.* 239.

So, if *A.* sells shares of a bubble of no value, he shall refund the money. 2 *P. W.* 154.

And a purchaser shall be aided in equity for the fraud, tho' he has an action at law for the money received to his use. 2 *P. W.* 156. 220.

(3 M 2.) Or Conveyance.

So, if by fraud, or circumvention, a person is engaged in the execution of a deed or conveyance. *Vide ante*, (2 *C.* 12.—2 *T.* 11.) *Post.* (4 *D.* 3.—4 *L.* 1.—4 *O.* 1.) 3 *P. Wms.* 66. 2 *Term Rep.* 763. 3 *Term Rep.* 551.

If a son, upon his marriage, gives a bond to refund part of the portion, without the privity of his father, he shall be relieved against the bond, as fraudulent. 1 *Sal.* 156.

If by an agreement of the father, before marriage, his estate was to be settled upon his daughter, her husband and their issue, and *A.* undertakes that a conveyance shall be made accordingly, but procures a conveyance to be made to himself in fee, in consideration of a debt due to him; it shall be cancelled, as fraudulent. *R. Ch. R.* 449.

If the daughter and heir of *B.*, who was *cestuy que trust* in fee of an estate in *A.* marries *C.*, who procures the surviving trustee to convey to him; and then the husband and wife levy a fine, to the use of the husband in fee; it shall be set aside as fraudulent, tho' five years, and non-claim have passed; and the husband and wife shall be decreed to re-convey to the heir of *B.* *Ibid.*

[If *A.*, a year after coming of age, grants his guardian or trustee an annuity, and at the same time a general release and two written discharges, on his delivering up some papers, it shall be set aside on principles of general utility: and more especially if it appears the guardian would not deliver the estate till he had the grant. *Hylton v. Hylton*, *T.* 1754, 2 *Ves.* 547.] [Yet

[Yet a ward or *cestuy que trust* may, when of age and put in possession, *et sui juris* and at liberty, grant a reward. 2 *Ves.* 547.]

[*Vide Cray v. Mansfield, ante, (3 I 2.) Oldham v. Hand, ante, (2 A 4.) Oldin v. Samborne, ante, (2 T 11.) Pross v. Hines, post. (4 D 3.) Walmsley v. Booth, post. (4 D 12.)*]

[If there is a conveyance for a fictitious consideration, it shall not be afterwards set up as a gift. *Bridgman v. Green, T. 1755, 2 Ves.* 627.]

[And this, tho' the fictitious consideration was inserted by the grantor; and tho' it has been found a gift by a jury, yet equity will relieve. *Ibid.*]

[If *A.*, heir in tail expectant (on the death of his father, aged 72, and infirm, and tenant in tail, with remainder to himself in fee) of an estate worth 3000*l.* and in necessitous circumstances, by articles, in consideration of 1500*l.* to be paid by *B.* in a year, and a house worth 200*l.* to be conveyed to him, covenants to convey said estate in fee to *B.*, subject to his father's life, soon desires to be off, but *B.* refuses; then by lease and release prepared by *B.* (an attorney), and executed at his house, only him, his son, and another present, and *A.* covenants that he is seised in fee, and a clause of warranty against his father and his heirs, and a fine levied by *A.* declared to be to the use of *B.* in fee, and *B.* conveys the house to *A.*, but without covenant or warranty, and the father soon dies, and *A.* writes letters acquiescing in the transaction, then files bill, charging fraud and praying relief, and *B.* answers, denying fraud; *B.* intimidates *A.*, who stays proceedings, and executes a deed, reciting the proceedings that the purchase was fair, and confirms and releases the estate to *B.*; afterwards they, with a common friend, settle accounts; two years after bill is dismissed, and three years after that *A.* dies; yet the whole shall be set aside, on *A.*'s son paying principal, interest, and lasting repairs. *Baugh v. Price, in Sc. H. 25 G. 2. 1 Wils.* 320.]

[Renewal of a lease obtained by collusion between lessee and steward of lessor for an inadequate consideration: bill to set it aside on refunding the money paid: after answer submitting to that, on receiving the money with interest, plaintiff by amended bill prayed either, as before; or that defendant should keep the lease, and pay the full fine; which, on account of the fraud, was decreed with interest at 4 per cent. on the residue from signing the lease and costs: but credit to be given for the money originally paid with interest, and on failure of the lessee, the steward to pay. *Lord Abingdon v. Butler, 1 Ves. jun.* 206. 3 *Bro. Ch. Ca.* 112. *S. C.*]

[Fraud in obtaining delivery of a lease, the execution of which was obtained *bona fide*, affects it equally, as if used to obtain the execution, delivery making it a lease. *Ibid.* 208.]

[Purchase of a legacy expectant on a death, and re-purchase by a *post obit* bond: the whole transaction set aside for fraud, and held not confirmed by a subsequent bond and payment of interest for four years, the obligee being influenced by an idea that he was bound by the former transaction: all the deeds set aside, and account decreed. *Crowe v. Ballard, 1 Ves. jun.* 215. 3 *Bro. Ch. Ca.* 117. *S. C.*]

[Instruments being set aside for fraud, a re-conveyance by the party who took under them ought not to be directed. *Semb. Bates v. Graves, 2 Ves. jun.* 287.]

[Where

[Where there is a conveyance and possession retained, with regard to third persons, the ownership is not divested; but when deeds are set aside between the parties themselves, and the heir of the party conveying, it must be on actual fraud, and the retaining is only evidence of fraud; which, with reasonable proof of weakness of capacity will be sufficient. *2 Ves. jun. 292.*]

[Where deeds are set aside for fraud, but the estate has been conveyed to a third person, as an instrument not privy to the fraud; or where they are set aside on paying so much money, a re-conveyance ought to be decreed. *Ibid. 295.*]

[Trustees having laid out the fund on a bad security obtained from the debtor under circumstances unfavourable, and to the prejudice of other creditors, a charge on his estate under a power: their bill to enforce the charge was dismissed with costs. *Bradbury v. Hunter, 3 Ves. jun. 187. 260.*]

(3 M 3.) Tho' the Bargain or Settlement was to take Effect upon a Contingency.

So, tho' the fraudulent contract is to take effect upon a contingency; as if *A.*, by practice, draws in *B.* for 300*l.* to grant him 300*l. per ann.* in fee; with a proviso that it should be void if *A.* had issue male who should attain the age of 21, tho' there was an improbability that he ever should have any issue. *R. 1 Ver. 238.*

So, if *A.*, upon a loan of 2000*l.* gives a judgment for 5000*l.* after the death of his father; and if he died before his father, to pay nothing; for the money would have been lost, without mentioning of it, if *A.* died before his father. *R. 2 Ver. 15.*

[An heir of 27, an officer in the guards, borrows 500*l.* to pay 1000*l.* if he survives his father and father-in-law, otherwise the lender to lose his money; if he survives he shall be relieved, even tho' he has paid the money thro' fear. *Curwin v. Milner, T. 1731, 3 P. W. 292.*]

[An heir borrows 1000*l.* and 1000*l.* to pay 2500*l.* for each if he survives his father, otherwise lost, grants two judgments for 5000*l.* each, defeasanced for 2500*l.*; relief granted as to the penalties only, *per Nottingham C. H. 33 C. 2.* and he paid 5390*l.* On re-hearing, plaintiff ordered to repay all above the 2000*l.* lent, and interest. *Per Jeffereys C. H. 2 J. 2. Berney v. Pitt, 3 P. W. 293.*]

[If a sailor sells his prize-money to a physician greatly under value, he assigns it, bill is brought to set sale aside, new agreement to dismiss bill with costs, and confirming the sale for further consideration, and the agent gives a note to pay it out of the second dividend; both agreements shall be set aside. *Taylor v. Rochfort, P. 1751, 2 Ves. 281.*]

If a sailor's prize-money is purchased at a great under-value, and then assigned to another, both shall be set aside, but shall stand as a security for the money really advanced to the sailor. *Hew v. Edwards, T. 1754, 2 Ves. 516. Baldwin v. Rochford, M. 22 G. 2. 1 Wilf. 229.*

[*A.* has 500*l.* left him if he survives testator's wife; he sells it for 100*l.*, to be paid by 5*l. per ann.* to him and his executors, &c., but if the wife dies in *A.*'s life, what is then unpaid shall be paid in a year;

year; the wife dies, the executors controvert the payment to the purchaser, *A.* hears their answer read, blames them, and executes a deed of confirmation; this bargain shall not be set aside on a bill brought by *A.* *Cole v. Gibbons, T. 1734, Per King C. affirmed per Talbot C. 3 P. W. 290.*

[A man caught in bed with another man's wife, by the husband with a sword in his hand, who is about to kill him, gives a note for 100*l.*; when payable, gives a bond for it, the court will not relieve against the bond, tho' it would against the note. *Per Cowper C. Anon. 3 P. W. 294.*]

(3 M 4.) Or was transacted by an Agent.

So, if the fraudulent practice be managed by an agent, to which the party who gives the small consideration does not appear to have been privy. *1 Ver. 240.*

(3 M 5.) So, a voluntary Settlement will be fraudulent as to Creditors.

[A settlement is not fraudulent for being voluntary, but it is an evidence of fraud, and there is scarcely a case where the person conveying was indebted at the time, that it has not been deemed fraudulent; where not indebted at the time, subsequent debts do not shake the settlement. *Hayward v. Hammond, M. 1738, 1 Atk. 13.*]

[So, if a voluntary settlement is made of lands, it will be fraudulent as to creditors. *R. 1 Ch. R. 132.*]

And as to articles for a purchase upon a valuable consideration. *1 Ch. R. 146. Vide Covin.*

So, a bill of sale from a man to *A.* who cohabits with him as his wife. *2 Ver. 490.*

So, a settlement with a power of revocation will be fraudulent as to creditors. *Vide Eq. Abr. 148.*

Tho' made after marriage for the jointure of a wife, if it is not made pursuant to an agreement precedent. *Ibid. [Vide 2 Brown, 90. 148.]*

[If money is left to a husband who settles it in trustees to the use of himself for life, his wife for life, and then his children, it is void as against his creditors, either before or after his marriage. *Taylor v. Jones, T. 1743, 2 Atk. 600.*]

[If on marriage of *A.* and *B.*, *A.* and his father promise to settle an estate on her, in consideration of the marriage and her fortune, but she refusing to let the father have it, he says she shall have none of his lands, and conveys them to *A.*, and *A.* afterwards being indebted, settles the lands on *B.* for jointure, and in strict settlement, and dies; this is voluntary, and void against creditors. *Beaumont v. Thorp, T. 1747, 1 Ves. 27.*]

[But if a man having a son, *A.* contracts on a second marriage to settle 400*l.* on wife for life, then to the issue of that marriage, together with *A.*, and *A.* only survives, he shall have the 400*l.* not subject to his father's creditors. *Itell v. Beane, H. 1748, 1 Ves. 215.*]

So, if *A.* makes a settlement for the jointure of his wife after marriage, with a power of revocation, and afterwards upon a treaty of a marriage for his nephew, proposes to settle lands of 700*l.* per ann. value in *A.* and *B.* on such marriage, if a portion of 2500*l.* is given; if the lands in *A.* and *B.* are not of the value of 700*l.* per ann. the

deficiency shall not be supplied out of lands in *D.*, settled many years before for the jointure of his wife, tho' such settlement was voluntary, and with a power of revocation. *R. Ch. R.* 148.

So, if *A.* makes a voluntary settlement for payment of creditors, and for raising portions for his children, reserving 50 *l.* per ann. to himself for life, it will not be fraudulent against creditors by bond given twelve years afterwards, tho' the trustees did not enter directly, but suffered *A.* to live in his house. *Cont. per Hutchins, but two commissioners dub.* 2 *Ver.* 261.

[If *A.* upon the purchase of a term directs it to be assigned to *B.* in trust for himself for life, and afterwards for a woman with whom he cohabits as his wife, it will not be fraudulent; for the term never was in him, and upon a purchase a man disposes of the estate as he pleases, and it will not be fraudulent. *R.* 2 *Ver.* 490.]

[If a son taking a benefit from his father's will promises to make it good, it may be a valuable consideration for a bond or settlement. *Blount v. Doughty*, *P.* 1747, 3 *Atkyns*, 481.]

[*A.* in partnership with his two sons *B.* and *C.*: *B.* retired; *A.* and *C.* continued in partnership, and failed. In the interval large sums were paid to *B.* in respect of a balance alleged to be due to him on account. The assignees of *A.* and *C.* file a bill against *B.*, and on circumstances of fraud appearing, an account was decreed against *B.* with regard to the period of the last partnership, but refused as to the previous time. *Anderfon v. Maltby*, 2 *Ves. jun.* 244.]

[*A.*, devisee of certain estates in trust to sell for payment of debts assigned to *B.* who wasted the property: *B.* was devisee in fee under the same will of other estates, part of which he mortgaged to *A.* to secure a debt due to him, partly from devisor, and partly from *B.* himself. The court directed that *A.*'s interest in the last-mentioned estates should be subject to the claims of the devisor's specialty creditors, and to the legacies of his daughters charged upon them. *Hardwicke v. Mynd*, 1 *Anstr.* 113.]

(3 M 6.) But Fraud shall not be presumed.

But fraud shall not be presumed in law or equity, without manifest proof. 3 *Ca. Ch.* 85. 114.

Nor, shall it be determined in equity, after it has been found by a verdict at law. 2 *Ver.* 238.

[Old age and inadequacy of price not sufficient to presume fraud. *Lewis v. Pead*, 1 *Ves. jun.* 19.]

[The creditors of the plaintiff, and among others the defendant, agreed to accept payment of their respective debts by instalments; the defendant got a new bond for half of his demand, and took the composition for the other half only; this held fraudulent on the other creditors, and on the wife of the plaintiff, who joined in securing the composition; and that the defendant, having signed the deed of composition, was stopped from claiming any other debt then due, and concealed. *Cecil v. Plaislow*, 1 *Anstr.* 202.]

[Where a creditor apparently accepts a composition, and gives a receipt for it, in order to enable the debtor to deceive his other creditors, but takes a security for the rest of his debt, such security is void, altho' there be no joint agreement among the creditors, nor any

one be in fact deceived by the fraud. *Fawcett v. Gee*, 3 Anstr. 910.]

[Purchase of an estate in the *West Indies* by a creditor, under his own execution, was, on the circumstances, held only a security for the debt, the expences of the proceeding and incumbrances paid by him, with interest, and subject thereto, a re-conveyance was decreed. *Lord Cranstown v. Johnston*, at the Rolls, 3 Ves. jun. 170.]

[On a deed of composition, one creditor was prevailed on by the debtor to represent his debt below the real amount, receiving notes for the dividend on the remainder, and bonds for the remainder of his debt beyond the amount of the dividend: on a bill filed by the debtor and a creditor, party to the deed, the bonds were decreed to be delivered up, but the court was of opinion that the defendant would be entitled to the benefit of the notes after all the trusts of the deed were satisfied, tho' not as against the creditors, and directed an enquiry as to that, reserving the question. *Eastbrook v. Scott*, at the Rolls, 3 Ves. jun. 456.]

[A. having an estate in fee of 6000*l.* a-year, and being tenant for life, without impeachment of waste of another estate of 5000*l.* a-year, with the reversion in fee after an estate in tail male in B., his only son by a former marriage, became indebted by mortgage, annuities, and otherwise, to the amount of near 100,000*l.* A. and B. joined in conveying both estates to trustees, upon trust, by sale or mortgage, sale of timber, or by rents and profits, to pay debts, and to apply so much of the rents and profits of what should remain unsold, as should seem meet to them, as a sinking fund, and to pay the residue to A., and to settle the remaining trust estates subject to an annuity of 1000*l.* to B., for the joint lives of him and A., upon A. for life, without impeachment of waste, with power to lease for 21 years only; remainder to trustees to preserve, &c.; remainder subject to a jointure to the wife of A., and portions for children by her, to the joint appointment of A. and B.; in default thereof, to the appointment of B. surviving; in default thereof to B. in tail male; remainder to the other sons of A. in tail male; remainder to B. in tail; remainder to the daughters of A. in tail, with cross remainders; remainder to B. in fee, with powers of leasing, and full powers of management in the trustees, and a provision for the appointment of new trustees, as vacancies should happen. The trustees raised 50,000*l.* by mortgage of the settled estate, which they applied to the debts; and they paid 2500*l.* a-year to A., and 1000*l.* a-year to B., from the date of the settlement. Upon the bill of A. to set aside the deed, except the trust for the debts, upon a general charge of fraud, misapprehension, and misrepresentation, or to controul the management of the trust, and for an account against the trustees; Lord Loughborough C. held, 1st, that the deed could not be set aside partially for fraud, nor under this bill totally; for then the prior estates in the settled estate must be re-vested clear of incumbrances, A. being under covenant to exonerate; and the mortgagees, who must either consent to change their securities, or be paid, were not parties: 2dly, that general charges of fraud required no answer, and could not support a decree: that upon the evidence there was no fraud or mistake, and that B.'s joining to subject the settled estate was a sufficient consideration: 3dly, that the court would not inter-

terfere with the trustees, there being no misbehaviour, and that the payment of the annuity to *B.* was good. The bill therefore was dismissed with costs, and the trustees having been always ready to account, the court refused to retain it for that purpose, but without prejudice to a bill for that only. *Myddleton v. Lord Kenyon*, 2 *Ves. jun.* 391.]

[A fair voluntary conveyance may be good against creditors, notwithstanding its being voluntary; and the *stat. 27 Eliz. c. 4.* does not go to it. By Lord Mansfield. *Cadogan v. Kennet*, *Cowper*, 434.]

[But a conveyance after marriage of personal estate for the separate use of the wife, is totally void as against creditors, for then there is no consideration. By Lord Mansfield Ch. J. 3 *Term Rep.* 620. *in not.*]

[To make a voluntary settlement void against a subsequent purchaser, within the *stat. 27 Eliz. c. 4.* it must be covinous and fraudulent, not voluntary only. *Doe v. Routledge*, *Cowper*, 705.]

(3 M 7.) A Party to the Fraud shall not be relieved.

A party to the fraud shall not have relief; as, if *A.*, entrusted to receive interest for *B.*, receives the principal, and then fails, and compounds for 9s. in the pound; but *B.* will not accept such composition, without a private agreement for 175 *l.* *A.* shall not be relieved against this agreement. *R. 2 Ver.* 602.

[If *A.*, on an intended marriage between his son *B.* and *C.*, proposing to give a bond for 100 *l.* *per ann.* for their lives, and the survivors, is persuaded by *C.* to make it 150 *l.*, that thereby her uncle may be induced to make a larger provision for her, promising to demand only 100 *l.*, tho' there is no contract on the part of the uncle, and tho' *C.*'s mother is living, yet if *A.* treats with him, he shall be considered as *in loco parentis*, and *A.* shall not be relieved against his bond. *Pitcairne v. Ogbourne*, *T.* 1751, 2 *Ves.* 375.]

So, if *A.* compounds with his creditors, but makes a private agreement with some of them, to induce an acceptance of the composition by others; he shall not be relieved on the agreement to compound, against the creditors, who signed the agreement. *R. 2 Ver.* 71.

But if a mortgagee upon her marriage settles the estate on herself for life, and afterwards on her issue, and the mortgagor, upon a decree for redemption, pays the money to the mortgagee, who takes no notice of the settlement in her answer; and afterwards the son of the mortgagee recovers in ejectment: the mortgagor shall be relieved, for there was no default in him. *R. 2 Ver.* 142.

(3 N.) Fine and Recovery.

(3 N 1.) Avoided for Fraud, &c.

Chancery will aid against a fine or recovery suffered by fraud; as, if a woman levies a fine, and declares the use to *A.* and his heirs, where it was intended to him only for life. *Vide post* (4 K 1, 2. — 4 S 4.)

Or, where there is proof that it was intended to *A.* only in trust, and she devises it to *B.* *Eq. Abr.* 258.

So, if a devise is to trustees, till debts are paid, and then to an infant and his heirs; *B.* enters, levies a fine, and five years pass without

without claim, whereby the infant at full age is barred in ejectment; he shall be aided in equity; for he shall not suffer by the neglect of the trustees in not entering. *Eq. Abr.* 258.

But *Chancery* does not vacate the fine or recovery for the fraud, but decrees a re-conveyance; for if there be error in it, or if the fine is irregular, or razed, or obtained by practice, it may be vacated by the court of *C. B.* *R. Eq. Abr.* 259.

[Tenant for years, at will, or at sufferance, cannot by a fine divest an estate, and turn it to a right. *Brereton v. Gamul*, *H.* 1741, 2 *Atk.* 240.]

[Confession of lease, entry, and ouster in an ejectment will not give a seisin to defendant in ejectment, so as to enable him to levy a fine. *Ibid.*]

[Tho' more parcels of land are put into a fine than belong to the confessor, yet a court of equity will restrain it to his land. *Ibid.*]

[Fines are levied by all descriptions of names to take in every thing; and it is no objection, that any thing described was not really included. 1 *Ves. jun.* 138.]

[Fine levied to certain uses, and to no other, is *functus officio*; and there cannot be any new uses declared by a subsequent deed without another fine. *Semb. Corbett v. Barker*, 1 *Anstr.* 143.]

[Supposing a fine to be good in law, yet if it is levied by a person who is in the nature of a trustee, as an administrator and guardian, entitled to a sum to pay debts, and distribute to the infant, this court will not suffer it to bar the equitable interest of creditors and infant. *E. Pomfret v. Ld. Windsor*, *T.* 1752, 2 *Ves.* 472.]

(3 N 2.) Aided, when defective.

So, equity will aid the defects in a fine, or recovery. *Vide Eq. Abr.* 258.

[If husband and wife mortgage, and covenant to levy a fine in *Easter* term next, but do not till *Trinity* three years after, and then sell the equity of redemption, and covenant that the fine shall be to the uses of this last deed, it is good. *Fleetwood v. Templeman*, *M.* 1740, 2 *Atk.* 79.]

But if tenant in tail covenants to levy a fine, and the caption is taken, and he dies before the fine is perfected, *Chancery* will not make the fine good. *Semb. Eq. Abr.* 258. *Vide post.* (4 S 2.)

So, if *A.*, upon the marriage of his eldest son, levies a fine to the use of him in tail, and upon his death, without issue, to the use of the younger son in tail, &c. The eldest has issue, who mortgages to *B.*, and dies without issue: equity will not aid a defect in the date of the deed, which leads the uses, upon a bill by the younger son; for the consideration did not extend to him. *R. Eq. Abr.* 258.

If a fine is levied by a purchaser, having notice of a trust, tho' five years pass without claim, the *cestuy que trust* shall not be barred. *Eq. Abr.* 256, 7.

If tenant for life makes a mortgage, and levies a fine to corroborate it, and afterwards his son, who has the remainder in fee, enters for the forfeiture, the mortgagee shall have it during the life of the mortgagor. *Eq. Abr.* 257.

And during the life of his wife, if she, having a trust for her life, joins in the fine. *R.* 2 *P. W.* 147.

But if a purchaser without notice levies a fine, and five years pass, the trust will be barred. *Vide Eq. Abr.* 256.

[But if *A.* in marriage settlement gives his wife a power to dispose of 100*l.* by will, to be paid to her a-year after his death, and in default, empowers *B.* to make a lease of lands to raise it; the wife makes an appointment, but never receives the 100*l.* while living; the heirs of *A.* mortgage the land to *C.*, without notice; *C.* afterwards purchases the lands; the heirs of *A.* levy fine, and convey the equity of redemption to *C.*, who has then notice of the power; tho' five years elapse, yet the appointee shall have the 100*l.* and interest from one year after the wife's death. *Willis v. Borral*, *H.* 1738, 1 *Atkyns*, 474.]

Vide Fine, (I 2.)

(3 O) Guardian.

(3 O 1.) How he shall account.

WHEN and how a guardian shall be assigned to an infant, *vide Guardian*, (A—F 2.) *Vide ante*, (2 A 1.)

If a parent receives a legacy given to his son, and is sued for it, he shall not be allowed for the maintenance and education of the infant out of the principal sum. *R.* 38 *Car.* 2. 2 *Vent.* 353.

[A father cannot apply a legacy left to a child by a relation in its maintenance, not putting it out apprentice, or setting it out in the world. *Darley v. Darley*, *M.* 1746, 3 *Atkyns*, 399.]

If a guardian compounds a debt, charged upon the estate of the infant, he shall not be allowed more of the infant than was paid. *R.* 2 *Ca. Ch.* 245.

[If any person, father or stranger, enters on an infant's estate, and continues in possession, he shall account as a guardian, unless the infant waives it when of age. *Morgan v. Morgan*, *H.* 1737, 1 *Atkyns*, 489.]

But a father shall discount the money for putting out the infant apprentice, out of a legacy given to his son. 2 *Vent.* 353. 1 *Ver.* 255.

So, money paid for a debt charged upon the estate of an infant. *Ca. Ch.* 157.

And money laid out for education, where the interest is too little for that purpose. 1 *Ver.* 255. *R. Ch. R.* 2.

[Yet if a man leaves 100*l.* to his son, not to be paid till 21, and 5*l.* *per annum* for his maintenance till then; the mother executrix shall have no allowance for putting him apprentice, fitting him out for the *East Indies*, or maintenance; but the 100*l.* and interest from the son's death shall be paid to his legatee. *Smee v. Martin*, *M.* 1723, *Bunb.* 136.]

(3 O 2.) How he shall manage the Estate of the Infant.

If a guardian has money of an infant in his hands, he shall employ it in payment of debts charged upon the estate of the infant, and shall not pay them with his own proper money. *R. Ca. Ch.* 156, 7.

[*A.* seised of some lands in fee, and of others in tail, devises the lands in fee (except 30*l.* *per annum*) to his daughter, and dies, leaving son and daughter infants; his widow takes the profits of both estates

as guardian, and on bill brought for account, swears she paid bond-debts out of the profits of the entailed estate, and then dies insolvent; the answer cannot be read against the daughter, and there is no other evidence; the court will intend she paid the bond debts out of the fee simple estate, as she ought to have done. *Chaplin v. Chaplin*, T. 1735, 3 P. W. 365.]

If the estate of an infant is mortgaged, it may be discharged out of the assets of his father; and if the infant dies, whereby the estate descends to a remote heir, the guardian shall not have the money repaid. 2 Ver. 193.

If 100 l. is given to an infant at his age of twenty-one, and if he dies before, to B. the guardian shall be allowed 20 l. out of the 100 l. for putting him out apprentice, tho' he died before twenty-one. 2 Ver. 157.

So, the guardian of an infant ought to pay the interest due upon a mortgage of his estate, out of the profits. 2 P. W. 279.

But if a guardian purchases for an infant lands, with the profits raised out of the real estate of the infant, and declares that it shall be for him and his heirs, if he discharges the guardian of the purchase-money; the infant dies under age, the heir of the infant shall not have the land, the purchase not being made by the direction of Chancery, but his executor shall have the money. R. 1 Ver. 403. 435.

[If a guardian is directed by will to make purchases for the benefit of infant, he may on a life in a lease's dropping take a new lease for new lives, tho' thereby the estate which before would have descended *parte materna*, now descends *parte paterna*. *Pierston v. Shore*, T. 1739, 1 Atkyns, 480.]

So, if a guardian vests the personal estate of an infant in the purchase of lands for the infant; the guardian shall take the purchase, and shall be answerable to the infant for the money. *Vide* 1 Ver. 436.

[Guardian cannot turn infant's antient pasture into arable, tho' on account of the distemper among cattle it is waste. *Clarke v. Thorpe*, H. 1750, 2 Ves. 232.]

[If trustee has an infant's money to lay out in funds, and lays it out in trade, the infant has his option to take the profits of trade, or the interest. *Anon. T. 1755*, 2 Ves. 629.]

So, if A. dies indebted by bond or other specialty, his heir under age; if the guardian pays off the bonds, and takes assignments, he shall have a discovery of assets against the heir of the infant; for he was not bound to pay the debts upon specialty out of the real estate of the infant. R. 2 Ver. 606.

[The court may make a liberal allowance out of the infant's estate to a mother, a guardian, who is in distressed circumstances. *Roach v. Garvan*, M. 1748, 1 Ves. 157.]

(3 O 3.) How directed by the Court.

If a guardian in socage is not of sufficiency, Chancery will oblige him to give security. *Decreed per North*, 2 Mod. 177. *Eq. Ca.* 137. 173.

If he is suspected to be insufficient, the court will oblige him to account annually. R. Ch. R. 39.

And the court can determine a right to a guardianship, without bill, upon a petition. 2 P. W. 118. 124.

[There may be an application to the court in case of a guardianship of children, tho' there is no cause depending. *Mellish v. De Cella*, M. 1737, 2 Atkyns, 14.]

[If there is no bill filed, no father, mother, nor testamentary guardian, no socage lands, the court will, on petition, refer to the master to see who is the most proper person for guardian. *Ex parte Watkins*, T. 1752, 2 Ves. 470.]

[The court may do several things *ex officio* for infants; may give extrajudicial directions, may hear a stranger as *amicus curie*, may on his complaint of the guardian, and of abuse of infant's estate, and undertaking to pay costs, direct the master to examine receiver's accounts, &c. *E. Pomfret v. Ld. Windsor*, T. 1752, 2 Ves. 472.]

So, if a guardian by testament endeavours to marry the infant to his disparagement, Chancery will oblige him to give security to the contrary. 2 Ca. Ch. 238. Eq. Ca. 137. 2 P. W. 110.

So, if a guardian commits waste upon the estate of the infant, an injunction shall be granted. *R. Hard.* 96.

So, if the guardian to a bastard is not a proper one, the court may remove him to the natural father. Eq. Ca. 116.

[If an infant is about to marry when there is no cause in court, without the approbation of his testamentary guardians, and they file a bill, and present a petition, the court will order the infant to continue in their care and custody, and that they do not permit him to marry, and the father of the lady not to permit his daughter to marry the infant without the consent of the court. *Case of Ld. Raymond (and Miss Chetwynd)*, M. 8 G. 2. C. T. T. 58.]

So, if any person marries an infant without the consent of the guardian allowed by the court, it will be a contempt. Eq. Ca. 177. 2 P. W. 111.

Cont. if it is not a guardian allowed by the court. 2 P. W. 562.

[Marrying an infant, ward of the court, is a contempt, tho' the parties concerned did not know it. *Herbert's Case*, T. 1731, 3 P. W. 116.]

[*Contra*, to make persons liable to the censure of the court, they must have had a hand in the contrivance of the marriage, and been apprized that the infant was a ward of the court. *More v. More*, P. 1741, 2 Atkyns, 157.]

[The court will order a man not to marry a ward of the court, and that all letters importing promise of marriage be produced before the master, and if he is an infant, will order his guardian, (his father,) tho' not before the court, not to permit him to marry the ward. *Smith v. Smith*, H. 1745, 3 Atkyns, 304. *Beard v. Travers*, M. 1749, 1 Ves. 313.]

If the court appoints a guardian, he usually gives a recognizance that the infant shall not marry, without the leave of the court, with his privy. P. W. 698. 2 P. W. 112.

And if the clause (with his privy) is omitted, the court will not suffer the recognizance to be sued, if done without his privy. P. W. 698.

[If a mother appointed guardian to two daughters by the court, misbehaves, and endeavours to marry one of them to A. an improper

proper person, the court will order her to place them with a proper person, that the daughter shall not marry without leave of the court, nor *A.* see or write to her. *Roach v. Garvan, M. 1748, 1 Ves. 157.*

So, the accomplices to a marriage may be committed. *2 P. W. 112.*

But if an uncle takes an infant out of the custody of his guardian, for his advantageous education, and sends him out of the realm; the infant shall be sent for home. *2 Ca. Ch. 238.*

If a guardian recovers upon a bond made to an infant, he shall be obliged to acknowledge satisfaction for so much as he received. *Mo. 852.*

Yet, a guardian in focage shall not be compelled to give security, till there is some default in him. *3 Ch. R. 60.*

[Infant went to Oxford, tho' his guardian would have him go to Cambridge; the court sent a messenger to carry him from Oxford to Cambridge, and on his returning again, another, *tam* to carry him to Cambridge, *quam* to keep him there. *Tremain's Case, P. 5 G. in Canc. Str. 168.*]

[The court will not indulge an infant in the choice of what school he shall go to, but will compel him to go where his guardian pleases. *Hall v. Hall, T. 1749, 3 Atkyns, 721.*]

[If testamentary guardians differ as to the education of their ward, the court will receive parol proof of the father's intention. *Anon. (Ld. St. John's Case), M. 1750, 2 Ves. 56.*]

[The inclination of an infant of the age of puberty as to the place of residence is of weight, where there is no imputation on the person chosen. *Miss Nichol's Case, T. 1751, 2 Ves. 374.*]

(3 O 4.) When he shall be removed.

If a guardian at common law misbehaves himself, the court upon cause shewn, may remove him. *Wilde Eq. Abr. 261. 1 P. W. 703.*

So, if a guardian appointed by the court is in poor circumstances. *Eq. Ca. 116. 140.*

So, a guardian appointed by Chancery, or by the ecclesiastical court, is removed *ad libitum*. *Eq. Ca. 140.*

So, if guardians appointed by will misbehave themselves, the court may interpose. *P. W. 703.*

Or, if there is only a suspicion of their misbehaviour. *P. W. 705.*

Or, if the guardians are directed to advise with *B.* who is attainted, they ought to act by the advice of the court. *P. W. 706.*

(3 O 5.) When not.

But where a guardian is appointed by will, the court will not remove him. *2 Ca. Ch. 238. Without cause. Semb. 1 Ver. 442.*

If several are appointed guardians, the court will nominate the survivor; for the interest survives. *Eq. Ca. 175.*

If a father by will appoints his wife and *A.* guardians to his son, and, if his wife marries, that they shall appoint another; the wife marries, but she and *A.* do not agree to name another, Chancery will appoint a guardian. *R. P. W. 703. in marg.*

If

If a guardian is appointed by the court for a lunatic, the court will not remove him, because there is another person nearer in blood; for he has not the right of custody by proximity of blood. *R. 2 Co. Ch. 239.*

So, if a guardian is appointed to the intent to pay himself a debt, due from the father, he shall not be removed without payment of the debt, or abuse of the trust. *1 Ver. 442.*

Yet a testamentary guardian, as well as a guardian by nature or nurture, or in focage, may be removed by *Chancery*, upon reasonable cause. *R. Eq. Ca. 141. P. W. 703.*

[The court will not determine a guardianship, or discharge an order made for a guardian, because of a marriage. *Roach v. Garvan, M. 1748, 1 Ves. 157.*]

(3 O 6.) When Payment to a Guardian is allowed.

If guardians appointed by will to an orphan, account in the court of orphans, for money due to the orphan, and pay the balance to *B.* named guardian, at the request of the friends of the orphan, by the court, who has given security *pro tanto* to the court; the payment shall be good, tho' *B.* afterwards fails, the orphan, at his full age, having allowed *B.* for his guardian. *R. 2 Ch. R. 12.*

But if *A.* named guardian to an orphan, and executor to his mother, pays to *B.* chosen by the friends of the orphan and approved by the court for his guardian, money over and above the sum for which *B.* gives security; that payment does not discharge *A.*, tho' the orphan, after his full age, approves of *B.* for his guardian. *R. 2 Ch. R. 12.*

So, payment of a legacy to the father of an infant, tho' there was a parol direction by the testator, that it should be paid to him, and tho' the son accounts with the father, and does not make a demand of the legacy for fifteen years after his full age, shall not be allowed, when the son afterwards becomes a bankrupt. *R. P. W. 285.*

(3 O 7.) The Power of a Guardian.

A guardian shall be by common law, or by statute.

By common law there was a guardian in *Chivalry*; but this was taken away by the *st. 12 Car. 2. 24.* But guardians in focage, by nature, or for cause of nurture, continue. *Vide ante, (3 O 1.)*

By the *st. 4 & 5 Ph. & M. 8.* if any take a damsel under sixteen out of the custody of the person to whom the father by will, or act in his lifetime appoints it, he shall suffer two years' imprisonment, or pay such fine as the court shall assess.

By the *st. 12 Car. 2. 24. s. 8, 9.* a father may by deed in his lifetime, or by will, dispose of the custody and tuition of his child or children, till their age of twenty-one or any lesser time, and such disposition of the custody to be good and effectual against all persons claiming the custody or tuition of such child or children as guardians in focage, or otherwise; and the persons to whom such custody shall be disposed, may maintain an action of ravishment of ward, or trespass against any persons wrongfully taking them away, and recover damages for the benefit of such child or children. And the persons to whom such custody shall be disposed may take into their custody

custody to the use of such child or children the profits of all their lands, and the custody and management of their personal estate, till their age of twenty-one, or any lesser time according to such disposition, and may bring such actions as by law a guardian in socage might do.

And if three are appointed, and one dies, the survivors are guardians, tho' it is not said, *to the survivors*. *R. 2 P. W. 107. 121.*

Guardian in socage, or by the *st. 12 Car. 2.* has an authority and trust coupled with an interest. *2 P. W. 122. Vide Guardian, (B 1, &c.—E 2.)*

And therefore, he may make leases, grant copyholds, avow in his own name, maintain ravishment of ward, &c. *2 P. W. 122.*

But a guardian by the *st. 4 & 5 Ph. & M.* has only a bare authority. *2 P. W. 122.*

[It is clear in point of law, that a testamentary guardianship is not assignable. *Mellish v. Da Costa, M. 1737, 2 Atkyns, 14.*]

(3 P) Heir.

(3 P 1.) When subject to the Debts of the Ancestor.

IF a man by specialty binds his heirs, the heir shall be liable to the payment of the debt, if he has assets by descent from his ancestor. *Vide Assets (A). Pleader, (2 E 2, &c.) ante, (2 G 1, &c.) Vide Heir.*

When he shall be bound by the covenant of the ancestor, *vide in Covenant, (C 2.)*

And tho' the penalty of a bond is 40*l.* instead of 400*l.*, it shall be aided against the heir. *R. 2 Ca. Ch. 225.*

And there shall be the same decree against the heir as upon a judgment at law. *R. 2 Ca. Ch. 225.*

If a man has land charged with an annuity of 250*l.* for four years, and receives the rent, but does not pay the annuity; the land shall be charged in the hands of his heir, tho' the four years are expired. *R. 2 Ver. 180.*

If a man settles land in trustees for payment of debts; it shall be good against the heir, tho' no creditor is a party, nor any particular debt expressed, nor covenant for payment. *R. Ca. Ch. 249. Vide post. (4 W 14.)*

Tho' the conveyance would be otherwise void. *Ca. Ch. 249.*

So, if land is settled to be sold for payment of debts; tho' the heir shall have advantage of the personal estate, to be applied in the first place for payment of debts; yet, a purchaser of the land shall be safe, tho' the personal estate was not sufficient for the payment of debts, and the heir shall take his remedy against the trustee. *R. 2 Ca. Ch. 115.*

So, a purchaser shall hold against the heir, tho' the trustee embezzles the money. *Ibid.*

So, if *A.* grants a watercourse in his land to *B.*, and covenants for himself and his heirs to cleanse it, and that all fines and recoveries of the land shall be for confirmation of the grant, and a recovery is afterwards suffered; the heir shall be obliged to cleanse the watercourse, for the covenant runs with the land. *Eq. Abr. 27.*

(3 P 2.)

(3 P 2.) When not.

But the heir shall not be answerable to another for the debt of his ancestor, who bound himself and his heirs by specialty, if he has not assets by descent.

So, in a writ of error against the heir on an erroneous judgment obtained by the ancestor in a real action, the heir shall not render damages, if he has not assets by descent. *Bro. Assets*, 3.

So, a bill for discovery of assets, against the heir, to satisfy the bond of his ancestor, shall not be allowed, if it does not appear that the heir was bound by the bond. *1 Ver.* 180.

So, if there is a verdict against the heir upon a false plea in debt upon the bond of his ancestor, and he dies before the day in bank, a bill for relief against his devisee shall be dismissed. *1 Ver.* 400.

(3 P 3.) What Advantages an Heir shall have, and what not.

When land is charged with the payment of debts, the personal estate shall be first applied in aid of the land. *Vide ante*, (3 A 3, &c. — 2 G 1.)—*post.* (3 Y 2.)

And the surplus shall be decreed to the heir. *Vide ante*, (3 A 5.)

So, when by settlement portions are charged upon land, to be paid at full age, if the infants die before, the benefit accrues to the heir. *Vide post.* (3 Y 2. 8. 15.)

[If a man devises his real estate, and also his personal estate, to trustees, to sell both for payment of debts, and then to apply the money arising from the personal and also from the real estate among his five children; thus, to the eldest son 200*l.* which he gives him at twenty-one, and the residue thereof among the four others, share and share alike; and if any of the four younger die, his share to go to the survivor, if the eldest die before twenty-one, the 200*l.* shall go to the heir of the testator. *Cruse v. Barley*, *M.* 1727, 3 *P.W.* 20.]

[Whether a portion charged on land is given with or without interest, by deed or by will, if the person dies before the age at which it becomes payable, it shall sink into the estate. *Boycot v. Cotton*, *M.* 1738, 1 *Atkyns*, 552.]

[But the interest accrued thereon before his death, if not paid, shall be paid to the person who maintained him. *Ibid.*]

So, if a devise is of the real estate, subject to debts and legacies, and that the creditors and legatees not paid may enter till satisfied; the personal estate goes in the first place in aid of the real. *R.* 2 *Ver.* 121.

So, a devise of lands for sixteen years for payment of debts and legacies; the surplus shall be to the heir. 2 *Ver.* 645.

Or, if it is for 500 years to pay debts and legacies, and four years afterwards to attend the inheritance; the surplus shall be immediately to the heir after debts and legacies paid. 2 *Ver.* 645. *Eq. Ca.* 187.

So, a devise of lands to be sold to pay debts and legacies, the surplus to his executor, and the personal estate shall go to the heir. 2 *Ver.* 645.

But if a man devises land to be sold for payment of debts and legacies,

gacies, and the surplus to his heir, and devises his goods with his house, and the residue of his personal estate to his sister, whom he makes executrix; the personal estate shall not go in aid of the real. 2 Ver. 718. Eq. R. 72. 129.

[If A. seised in fee of lands, possessed of personal estate, gives all his worldly goods to his wife, and then devises the lands to her for life, then to R. his son, and his heirs, and gives M. his daughter 150*l.* to be paid her in twelve months after R. shall come to enjoy the premises; and if R. dies before his mother, then H. another son coming to the possession thereof, and surviving his mother, shall pay M. 200*l.*; this charges the real estate only, and shall be paid by the heir claiming under the devisee and heir at law of testator. *Miles v. Leigh*, M. 1738, 1 *Atkyns*, 573.]

So, if the grandfather mortgages and dies, then the father dies; the personal estate of the father shall not be applied for the payment of the mortgage. *Sal.* 450.

If a man purchases an equity of redemption, the mortgage shall not be paid out of his personal estate. 1 Ver. 37.

So, if a mortgagor devises lands in mortgage to B. and other land for payment of debts; B. shall take the lands in mortgage *cum onere*. R. 2 Ver. 183.

[If A. devises lands to B. in tail, remainder over, &c. then in mortgage for 1300*l.*, and devises other lands subject to his debts, in case his personal estate and other estates devised for that purpose are not sufficient, to C.; the 1300*l.* must be paid out of personal estate, or, if deficient, out of the real estate devised to C. *Bartholomew v. May*, H. 1737, 1 *Atkyns*, 487.]

[If a man seised in fee of an estate, having borrowed money, gives bond for it, and afterwards a mortgage on it, and afterwards by will devises the estate in fee so mortgaged, and also an estate for lives to A. his wife, and makes her sole executrix, and after making his will purchases at two different times the reversion in fee of the lifehold estate, and dies without altering his will: the lifehold estate, and the reversion of it, so purchased, shall descend to the heir at law, but it shall be liable as real assets to exonerate the mortgaged estate in fee devised to A. the wife. *Galton v. Hancock*, M. 1742, T. 1743, T. 1744, 2 *Atkyns*, 424. 427. 430.]

[If A. and B. his wife, seised in right of B. of lands in D., held by lease for three lives, and seised of the inheritance in fee, expectant on the death of B.'s grandmother and mother, of a manor and lands in L., mortgage the lands in D. for 1000*l.*, and then the manor, &c. in L. for 800*l.*, and then on borrowing 200*l.* more, subject both to payment of the three sums, and before payment A. dies, and B. becomes solely seised, and borrows 240*l.* 6*d.*, which with 159*l.* 19*s.* 6*d.* interest, makes up 2400*l.*, and by indorsement on the second mortgage makes both subject thereto; and then agrees with C. that for 2260*l.* 10*s.* she will convey to him and his heirs the estate in L. subject to the two lives, the money to be applied in discharge of the mortgage, and that the lease should be renewed, and a third life (C.'s son) added, and then C. to lend her 1600*l.* to pay the residue of the mortgage, the fine, and her debts, and C. pays 100*l.*, and the grandmother dying, C. agrees to pay 146*l.* more, and pays several other sums in part, and the lease is renewed and the fine paid,

paid, and *C.* takes notes and a bond for the sums advanced till the agreement shall be compleated, and before that *B.* dies intestate. On a bill brought by her administrator for himself and the creditors of *C.* admitting the facts, the agreement shall be carried into execution against the heir at law. *Lacon v. Mertins, M. 1743, 3 Atkyns, 1.*

So, if in a mortgage there is no covenant for payment, and the mortgagor's personal estate is devised to his wife; it shall not be applied to the mortgage. *2 Ver. 701. Eq. Ca. 129.*

So, if *A.* having power to charge 500*l.* for payment of debts, makes a mortgage for that purpose, and, upon an assignment of the mortgage, his son covenants to pay; the personal estate of the son shall not be applied. *2 P. W. 659.*

If a debt is recovered against the heir upon the bond of his ancestor, when the executor has assets; the executor shall be compelled in equity to reimburse the heir. *Ca. Ch. 74. Per Hale, Hard. 512. 1 Ch. R. 156.*

If a man enters into an article for the purchase of land and dies, the money shall be decreed to the heir for the purchase. *1 Sal. 154. 2 P. W. (632.) Vide Assets, ante, (2 G 1.)*

So, a mortgagee shall be paid out of the personal estate, if there are assets for debts and legacies. *Sal. 449. R. Ch. R. 401.*

So, if there is a residuary legatee, the heir shall be aided out of the personal estate. *R. 2 Ver. 43. R. Eq. R. 72.*

Tho' he be the devisee, after the death of the residuary legatee, and also heir. *Dub. 2 Ver. 470.*

But if a man is indebted by mortgage, stat. &c. which charge the real estate, and there are personal assets for other debts; if the mortgagee, &c. recover their debts out of the personal estate, the other creditors shall be relieved against the heir in equity, for so much as was chargeable on the real estate. *Vide post. (3 Y 6.)*

So, shall a legatee, where, by extent, &c. upon the personal estate, no assets remain for legacies. *R. 2 Ca. Ch. 5.*

Or, if the personal assets are exhausted by payment of debts, for which the land was charged. *R. 2 Ca. Ch. 117.*

If the case is dubious, the heir shall be preferred. *D. Ca. Ch. 7. 2 Ver. 571.*

If a devise is to a daughter in fee, proviso that the son and heir shall have the land, if he pays 50*l.* at such a day; if he does not pay it at the day, and the daughter sells, the heir shall be relieved, upon payment afterwards, against the vendee. *R. 2 Ca. Ch. 1.*

If a devise is to *A.* and his heirs, in trust to pay a third of the profits to his wife in lieu of dower, till his son is twenty-one; and out of two-thirds to raise portions for younger children, and after the full age of his son, to him in tail, &c. If the son dies before the age of twenty-one, the profits after the death of the wife and the portions raised, go to the heir at law, his executor, or administrator. *R. 2 Ver. 139.*

If a man devise to three and their heirs, to the use, or in trust for *A.* for life, and his issue severally in tail male, without limiting any use or trust of the fee; it shall be decreed to his heir at law, and not to the trustees. *R. 2 Ver. 644.*

If a man settles an estate by deed or will, all that is not otherwise

wife disposed of goes to his heir; as, if he settles an estate in trust, that if his daughter marries *A.* and has issue, it shall be to *A.* and his wife for their lives, and after their death without issue, to *B.* in tail, and for default of such issue to *C.*, which *B.* and *C.* are his heirs at law; if the daughter has no issue, whereby the condition precedent is not performed, and *A.* cannot take for his life, *C.* shall have one moiety of the profits, and *B.* the other, during the life of *A.* *R. Ca. Parl.* 87.

[If one devises a rent-charge to be sold to pay legacies amounting to 800*l.*, and if it sells for 1000*l.* then to pay a further legacy of 200*l.*; if it sells for more than 800*l.* and less than 1000*l.* the surplus shall belong to the heir as a resulting trust. *Stonehouse v. Evelyn*, *P.* 1734, 3 *P. W.* 252.]

[If there is an executory devise of lands with a proviso in the will, that the profits (beyond an allowance) shall be laid up for the first person that shall be entitled to the lands when he attains twenty-one, and the testator dies, leaving no person *in esse* to take under the limitations; until such person be born, the profits are to be looked upon as a residue undisposed of, and descend to the heir at law. *Hopkins v. Hopkins*, *M.* 8 G. 2. *C. T. T.* 44. To this determination Mr. *Pope* alludes in his account of *Vulture Hopkins*.]

[And if such person comes *in esse*, and dies, the heir at law is still entitled to the profits above the maintenance during this infant's life, and to all profits afterwards, till a person comes *in esse*, entitled to an estate for life in possession. *Hopkins v. Hopkins*, *T.* 1749, 1 *Ves.* 266.]

[If *A.* settles lands in *H.* to himself for life, to trustees to preserve, &c. to his first and other sons in tail, to *B.* for life, to trustees to preserve, &c. and to his first and other sons in tail, to the right heirs of *A.* with power of revocation on settling other lands in *G.* of equal value, and free from incumbrances to the same uses; and afterwards by will devises these lands to *C.* for life, and all his other lands to trustees, for the use of his only daughter and child, with remainders over, and directs all his personal estate to be laid out in lands to be settled to the same uses; and afterwards by lease and release intended as an execution of the revocation in the first settlement, conveys lands in *Y.* to the same uses as those in *H.*, but these lands are not of equal value, and are subject with others to a term to raise 10,000*l.*, this is not a good execution of the power of revocation; the second deed is a revocation of the will as to the lands in *Y.* thereby settled, and if *B.* chuses to adhere to the lands in *H.*, he is a trustee for the lands in *Y.* for testator's heir at law, and *C.* is not entitled to any equity against him. *Burgoigne v. Fox*, *P.* 1738, 1 *Atkyns*, 575.]

[If a man devises all his freehold lands in the occupation of *L.*, and all the rest of his estate, consisting of ready money, jewels, leases, judgments, mortgages, &c. or in any other thing whatsoever or wheresoever, to his wife, yet the rest of real estate does not pass. *Timewell v. Perkins*, *M.* 1740, 2 *Atkyns*, 102.]

[If a man devises to his son *H.* all his freehold and copyhold in *C.* (which copyhold I have surrendered to the use of my will) and dies, having surrendered part of a house, and not the other part which he had purchased after the surrender, only what was surrendered shall pass,

pass, and the customary heir shall not be disinherited of the rest. *Gafcoigne v. Barker, M. 1743, 3 Atkyns, 8.*]

[If a man by articles before marriage covenants to settle lands, or a rent-charge thereout, of 40 *l.* per annum on trustees, to the use of him for life, wife for life, in bar of dower, remainder to the heirs of their bodies, and he has then no real estate, but purchases afterwards one of 9 *l.* in *A.* and then another of 40 *l.* in *B.*, subject to an estate for life to another in an undivided moiety, the lands in *A.*, and the moiety in possession of those in *B.*, shall be considered as purchased in performance of the covenant, and go towards the widow's jointure, the moiety not in possession shall go to the heir at law. *Deacon v. Smith, P. 1746, 3 Atkyns, 323.*]

[If *A.* by articles previous to his marriage with *B.* covenants to lay out 2000 *l.* in land, and to settle on *A.* for life, *B.* for life, then to trustees to sell and divide the money among the children of the marriage, to sons at 21, daughters 21 or marriage, provided no sale be made till one of the shares become payable; and lands are purchased, part before, part after *A.*'s death. *C.* the only child attains 21 in *B.*'s life, but never applies for a sale, nor are the lands conveyed to her, but she lets leases of them, reserving rent to her and her heirs; *B.* dies; *C.* dies intestate; the lands shall go to the heir at law, and not be considered as personal estate. *Crabtree v. Bramble, H. 1747, 3 Atk. 680.*]

[If a woman under age gives a personal legacy to her daughter, and devises her real estate to a stranger, the daughter is not obliged to make an election, but shall take the legacy under the will, and the real estate as heir at law, the will as to that being void. *Herle v. Greenbank, P. 1740, 3 Atk. 695. 1 Ves. 298.*]

[If a man gives legacies to his executors, and a copyhold to *A.*, he paying his executors 1000 *l.*, and gives the residue of his estate to a charity, this 1000 *l.* is a charge on real estate, therefore void by statute of *mortmain*, and the devisee cannot take without performing the condition, therefore the 1000 *l.* shall go to the heir. *Arnold v. Chapman, T. 1748, 1 Ves. 108.*]

If a man settles an estate in trust for such uses as he shall appoint, and appoints that the trustees convey to his daughters generally; the daughters have only an estate for life, and the heirs shall have the reversion. *R. 2 Ca. Ch. 125.*

Tho' the trust was for want of an appointment, to his son and daughters and their heirs; for he has made an appointment. *R. 2 Ca. Ch. 125.*

So, if a lease for three lives is in trust for *B.*, who dies; the trust shall be decreed to his heir. *R. Ca. Ch. 311.*

If a devise is of land for fifteen years, in trust for payment of debts; after the debts are paid, the residue of the profits during the years shall be decreed to the heir. *R. cont. but a Qu. is there made. Ca. Ch. 98. 1 Ch. R. 263.*

[Money agreed to be laid out in land shall be taken as land, and go to the heir, whether the money was in the hands of trustees, or remained in the hands of the covenantor. *Lechmere v. E. Carlisle, M. 1733, 3 P. W. 211. O. T. T. 80.*]

[But if the covenantor after the covenant purchases lands in fee-simple, (tho' without the consent of trustees, as the agreement required,) they shall go as a satisfaction *pro tanto*. *Ibid.*]

[If money is settled to be laid out in land, and afterwards all the parties interested agree, that if *A.* dies before it is so invested, then it shall go to them, and their executors and administrators, according to their respective interests, and one of the parties dies before *A.*, it shall go to the heir, and not to the executor. *Oldham v. Hughes*, *M.* 1742, 2 *Atkyns*, 452.]

[But where there is a trust of money clearly intended to be considered as money, tho' afterwards there is a power given to the trustees to lay it out in land, yet if it is not done, it shall not be considered as land, nor go to the heir. *Stamper v. Millar*, *H.* 1744, 3 *Atkyns*, 212.]

[So, if a man by will directs his real estate to be sold, and the produce, together with his personal, to pay debts and legacies, and one of the legacies is void by law, or lapses, it goes to the residuary legatee, not to the heir at law. *Durour v. Motteux*, *M.* 1745, 1 *Vesf.* 320.]

[So, where *A.* by will directed money to be laid out in manors, lands, tenements, tithes, and hereditaments, or very long terms, with limitations applicable to real estates, held that the quality of land was not imperatively fixed on the money, since it might be invested in land, and still continue personalty. *Walker v. Denne*, 2 *Vesf. jun.* 170.]

[As between real and personal representatives their rights are purely legal: chance decides between them; and neither has any equity to convert the property. *Ibid.* 261.]

[An heir is excluded only by testator's giving to somebody else; for the heir will take what is not disposed of even against testator's intention. 2 *Vesf. jun.* 225.]

[*A.* entitled to a sum of money, secured by a trust term, and also to another sum of money under a covenant in her father's settlement to convey to the use of his eldest son in fee, subject to such second sum as an additional provision for younger children; dies before either of the sums was raised, leaving her brother a lunatic her sole next of kin, and entitled to the estates liable to the two sums; he dies, and held that his heir takes the estates discharged. The trust term makes no difference; for it remains inert, unless required to be executed for proper purposes: the trustees have no discretion. *Lord Compton v. Oxenden*, 2 *Vesf. jun.* 261.]

[Testatrix directed her real estate to be sold, and all her estate to be converted into money, for the purposes of her will, which were all satisfied without touching the real: no equity for the next of kin against the heir. *Chitty v. Parker*, 2 *Vesf. jun.* 271. 4 *Bro. C. C.* 411. *S. C.*]

[Lands devised to be sold; the produce to be applied as after-mentioned: if no disposition be made, the heir shall take. *Sheldon v. Barnes*, 2 *Vesf. jun.* 447.]

[Testator gave real estates to be sold, and the produce to be considered as part of his personal estate, and thereout, and out of his personal estate gave legacies to his next of kin, heir, and others; he gave other estates to be sold, and the produce to be considered from thenceforth as other part of his said personal estate, and to be disposed of in manner following: he then gave legacies, and some estates specifically, and other legacies out of his said trust-monies

and personal estate, and gave his executor 1000 *l.* to be disposed of according to any instructions he might leave in writing, and gave all the residue of his goods and chattels, personal estates, and effects whatsoever, subject to debts, legacies, &c. No instructions being found, the heir held to be entitled to the 1000 *l.* *Collins v. Wakeman*, 2 *Ves. jun.* 683.]

[Devise of real and personal estate in trust to discharge debts and legacies; the personal alone being sufficient, and the residue undisposed of, held to be a resulting trust as to the real for the heir at law. *Robinson v. Taylor*, 1 *Ves. jun.* 44.]

[Tenant in tail restrained as to alienation, but with powers of leasing and jointure, with the restrictions usual on tenants for life, considered as tenant for life, and his administratrix held to be a creditor for a charge on the estate paid by him, and which he treated as a charge, tho' the subsequent remainders were exactly of the same nature; and the term being originally a short one, had little more than 40 years to run. *Countess of Shrewsbury v. the Earl of Shrewsbury*, 1 *Ves. jun.* 227. 3 *Bro. C. C.* 120. *S. C.*]

[Devise of personal estate, and of rents and profits of real, in trust to accumulate and be laid out in land, to be conveyed with the real to the youngest or only son of the trustee at 21: held a vested interest by executory devise in an only surviving son, and not to wait till the death of the father, but liable to be devested by birth of another son. The trustee survived his son several years, and received the rents and profits till his death, but never laid them out in land as directed: those accrued after the son made his will held to be an equitable interest in land, and therefore to pass under it. *Perry v. Philips*, 1 *Ves. jun.* 251.]

[*A.* conceiving himself entitled to a copyhold was admitted, and sold it: it afterwards descended to him: he died without perfecting the conveyance. This is a personal equity, and does not bind his heir. *Semb. Morse v. Faulkner*, 1 *Anstr.* 11.]

[By settlement on marriage, reciting an intention to provide for the wife and children, certain tolls were granted for the remainder of the grantor's term, in trust to raise an annuity for the lives of the wife and her mother, and the survivor: then reciting that the remainder of the term might expire in the life of the wife or her children, therefore to make a provision for her and her children by her then or any future husband; the trustees should be possessed of the said tolls for the remainder of the term, upon trust to raise after the deaths of the grantor and the mother of the wife, 100 *l.* annually, to be placed out in the purchase of freehold lands or hereditaments, or leasehold estates for two or three lives, as often as a competent sum should be raised for that purpose, and until convenient purchases should offer, to be invested in government securities upon trust; in case the wife should survive the term, to pay the rents and profits of such estate or estates so to be purchased, or the interest, produce, and profits to arise from the money so intended to be placed out, until such purchase should be made, to the wife for life: and after her decease to apply the said rents and profits, or interest-money towards the support and maintenance of such child and children of her as should be living at her death till the youngest should be 21; and then to be possessed of such estates so to be purchased, or of the money arising from

from the annuity not placed out in one or more purchase or purchases, to the use of such child and children, in such shares and proportions, payable at 21, as the survivor of the husband and wife should by will or deed direct, limit, and appoint; in default thereof to the use of all such children, equally to be divided at their respective ages of 21; but if she should die without leaving any child or children, or all should die under 21, then to the use of the grantor, his heirs, executors, administrators, and assigns, and after paying the said annuities, to be possessed of all the surplus money arising from the said tolls during the remainder of the term for the use of the grantor, his executors, &c. From the death of the grantor, who survived the wife's mother, the trustees received 100*l.* a-year, and laid out in stock the sums received, and the produce. One son was the only issue; he attained 21 in the life of his mother, and survived her. The court would not invest the fund in land; but held it with the accumulations from the death of the grantor, and the future payments as a vested interest in the son at 21, and as personal estate belonging to his administrator. *Swann v. Fonnereau*, 3 *Ves. jun.* 41.]

[Testator devised all the residue of his estates, as well copyhold as freehold, the copyhold part having been previously surrendered to the use of my will on several trusts in favour of his wife and children, the only trust for the eldest son and heir was an annuity of 300 *l.* for life, remainder to his wife and children, the testator having, in fact, never surrendered the copyhold, the kin was decreed to elect, and was held not bound by receiving half a-year's payment of the annuity while abroad. *Rumbold v. Rumbold*, 3 *Ves. jun.* 65.]

[Estate sold, subject to a mortgage, held to be exonerated in favour of the heir by the personal estate of the purchaser, his acts having clearly made it his personal debt. *At the Rolls*, *Wood v. Huntingford*, 3 *Ves. jun.* 128.]

[Altho' the testator charged his real estate with debts in aid of the personal, held that the personal might be given exempt from the debts by an unattested codicil. *Coxe v. Basset*, at the *Rolls*, 3 *Ves. jun.* 155.]

[Real and personal estate devised to the executor in trust to pay debts and legacies, the rest and residue to himself, it appearing to be the only purpose of devising the real estate to insure payment of the debts, without any intention to disinherit the heir, it was held only a charge, and that the heir was entitled to the surplus of the real estate. *Halliday v. Hudson*, 3 *Ves. jun.* 210.]

[Money bequeathed to *A.* to remain at interest or to be by him laid out in real estates, to go with other estates devised. *A.* being tenant in tail of the real estates, and being entitled under an assignment of the money from the reversioner, subject to contingent limitations, disposed of the money by will: the court inclined in favour of the disposition, on the ground that *A.* might have called for the money as absolute owner; but it was established on the option to continue it personal estate. *Amler v. Amler*, 3 *Ves. jun.* 583.]

[Personal estate not exempted from debts by a charge on the real. *Burnaby v. Griffin*, 3 *Ves. jun.* 266.]

[Real estate devised to be sold, and the produce disposed of with the personal, with a power to direct the fund to be laid out in land,

no such direction having been given, it was held personal property. *Maberly v. Strode*, 3 *Ves. jun.* 450.]

[Under the constitution of the Hand-in-Hand Fire-office, the heir, to whom, on the death of the insurer, the property, being freehold, descended, cannot have the benefit of the policy without assignment. *Mildmay v. Folgham*, 3 *Ves. jun.* 471.]

[Trust term in a will to raise out of a real estate several sums, of which some were secured by the testator's bond and covenant, the intention being to give them as portions out of the land, not as debts or legacies, the personal estate held not applicable. *Reade v. Litchfield*, 3 *Ves. jun.* 475.]

[An heir at law has no equity, except to remove incumbrances in the way of his legal right. He cannot call for an inspection of deeds in the possession of the devisees. *Lady Shaftsbury v. Arrowsmith*, 4 *Ves. jun.* 66. (See also *Ivy v. Kekewich*; 2 *Ves. jun.* 679.)]

[Bill by heir in tail against devisees. On motion an inspection was ordered of all deeds of settlement admitted to be in the possession of the defendants, creating estates in tail general, but no farther. *Ibid.*]

[Testator gives legacies to be raised by the means after pointed out; then directs an estate to be purchased, a sum to be raised for maintenance, and the residue of the rents to be applied to raise the legacies; and in default makes the estate liable. The legacies are not personal, but a charge on the real estate, and one of the legatees dying an infant, the legacy shall not be raised for the administrator. *Harrison v. Naylor*, 3 *Bro. C. C.* 108.]

[*F. W.* having an estate, which came to her *ex parte materna*, on her marriage, conveyed the same to trustees to such uses as she should direct, with remainder to her own right heirs. By will she directed the estate to be sold, the money to be laid out in the funds, and the trustees to permit the husband to receive the interest for life: then (after the deduction of 3500 *l.* to uses which vested in the plaintiff *A. J.*, and after payment of 1000 *l.* to *G. P.*) to pay the residue of the purchase-money to the three defendants *H.* By codicil she gave the plaintiff her husband a power of appointing the 3500 *l.*, in case *A. J.* should marry without his consent. *G. P.* died, living the testatrix, before the codicil made, but *F. W.* in the codicil took no notice thereof. The 1000 *l.* held to be real, not personal, and not to go to the executors of *G. P.* (tho' given to her executors), nor to the personal representative of the testatrix, nor yet to the residuary legatee of the purchase money, but to the heir at law *ex parte materna* (the side from which the estate came). *Hutchinson v. Hammond*, 3 *Bro. C. C.* 128.]

[Exoneration of real by personal estate. *Foley v. Percival*, 4 *Bro. C. C.* 419.]

[Devise of copyhold subject to a mortgage not sufficient to exonerate the personal estate from the payment of the mortgage-money. *Astley v. Earl of Tankerville*, 3 *Bro. C. C.* 545.]

[If a man by will gives all his wordly estate, all his real and personal estate to trustees, to pay several annuities and other sums out of personal, and if that is deficient out of rents and profits of real; and as to the residue of real and personal, to such children as his daughter

daughter should have, equally; if she dies without issue, to others, and directs, that on the death of annuitants their annuities shall go back to the residue, and go to those in remainder over, but this provided his daughter dies without issue, otherwise to be divided among them equally; the surplus rents and profits of the real estate accumulate, and do not go to the heir at law; but whether to the daughter's children or to those in remainder over, *Qu.?* *Gibson v. Ld. Montford, T. 1750, 1 Ves. 485.*

If by articles the portion of the wife, and so much money of the husband are to be vested in a purchase for the use of the husband and wife and the heirs of their bodies, without saying how the use shall be afterwards, and both die without issue before a purchase; all the money shall go to the heir of the husband, and not to the executor of the wife, tho' she survived. *R. 2 Ver. 20.*

If an heir purchases a prior mortgage or incumbrance to defend him from mesne incumbrances; on a bill by the mesne mortgagees, this prior mortgage does not aid the heir; for he shall not be allowed more than the money *bonâ fide* paid for the purchase of it. *R. 2 Vent. 353. 1 Ver. 335, 6. 464.*

If a man creates a term in trustees for portions for his daughters to be paid at marriage, or age of 21 years, and afterwards in trust for his heir, and by his will devises the like portions for his daughters, but says that his daughters shall not have double portions, and one daughter dies under age and unmarried: her portion sinks for the benefit of the heir. *R. 1 Ver. 205. 324. R. 2 Ver. 93. Vide post. (3 Y 8.)*

So, if the term is for raising 6000 *l.* for the issue with which his wife is *præsentement*, if it be a daughter; a daughter is born, but dies; the portion does not go to her administrator, but sinks for the benefit of the heir. *R. 2 Ver. 208.*

If *A.* covenants to pay 1000 *l.* to *B.* for building a new house upon his estate, and dies before the house is built; the heir, if there are personal assets, shall compel the executor or administrator to build the house. *Ibid. 322.*

[If a person incapable to manage his affairs, and who is afterwards found lunatic, at that time lays out part of his personal in the purchase of real estate, with the approbation of his only son, the purchase shall stand. *Sergeant v. Sealey, M. 1742, 2 Atkyns, 412.*]

But if a portion is limited to be raised out of land for a daughter, without limiting any time of payment; if the daughter, at her age of 17, disposes of the sum to be raised by her will, the portion shall be paid to the executor of the daughter. *R. 2 Ver. 74. 352.*

So, if the portion is appointed to be paid at the age of 18 or marriage, the daughter, after 18, may dispose of it by her will, tho' she dies before marriage. *R. and affirmed in Parliament, 2 Ver. 352. 354.*

If a man devises lands to *A.* to pay 600 *l.*, to be within six months after his death, and in default thereof to *B.* and his heirs; *B.* dies within three months; the lands shall go by the limitation to the heir, and not as a mortgage to the executor. *R. 1 Ver. 402. Eq. Abr. 105.*

[If *A.*, incumbent and patron of *B.*, as to his worldly goods, after debts paid, disposes thus; he devises the advowson, glebe, profits, and

and appurtenances, to C., his mother-in-law, willing her to sell it as soon as she conveniently and lawfully may to *Eaton College*, or if they do not agree, to *Trinity*, or if they do not agree, to any college, the best purchaser; and gives C., her heirs, &c. his freehold lands in O., and after some small legacies gives her the residue, and makes her executrix; there is no resulting trust to the heirs at law of A., but a devise of the beneficial interest to C., with injunction to sell to particular societies. *Hill v. Bishop of London*, H. 1738, and T. 1739, 1 *Atkyns*, 618.]

[If A. patron and incumbent of S., by will devises the advowson to B. on trust, to present W. his son, and then to sell it, and after payment of debts to distribute the residue in thirds to his daughters, and if either die before 21, or marriage, her third to the son if he confirms the will by deed, if not, to the surviving daughters; W. is presented and dies before the sale, leaving an infant daughter; there is no resulting trust for the heir at law, and the ownership in equity is vested in the *cestuy que trust* of the surplus, who shall present. *Hawkins v. Chappel*, M. 1739, 1 *Atkyns*, 621.]

[If a man seised in fee of A. directs that it shall be exchanged for B. and for that purpose devises it to trustees to make the exchange, and to permit his wife to enjoy A. till the exchange, and then to settle B. on his wife for life, with remainders to the same persons to whom he had limited other manors by his will, whereby he has devised all his real estates to trustees, and the exchange cannot be made; the heir at law of the testator, and of the surviving trustee for A. shall not have A., but the person entitled under the will to the other manors shall have it. *E. Coventry v. Coventry*, T. 1742, 2 *Atkyns*, 366.]

[The court will not declare a will well proved, where the heir at law is not before the court, tho' he cannot be found; but it will decree a sale. *French v. Baron*, H. 1740, 2 *Atkyns*, 120.]

[If an heir at law, defendant admits the will that disinherits him, he is not entitled to inspect the deeds of the estate. *Potter v. Potter*, T. 1749, 3 *Atkyns*, 719.]

[If a man by will devises his land to his younger son, and gives a contingent legacy to A., who becomes his heir at law, with express condition not to dispute the will, which is not duly executed to convey lands, A. when of age shall make election of the legacy or the lands. *Boughton v. Boughton*, T. 1750, 2 *Ves.* 12. See also 2 *Ves. jun.* 371, 372.]

[If a man devises that till A. attains 21 or marries, her mother B. shall receive the rents, and pay A. 300 l. a-year, and retain 900 l. *per annum* to herself, and to account with A. if she attains 21 or marries; if A. dies before either, then to C., his niece and heir at law: the court will not appoint a receiver on the prayer of C., but (*Semb.*) will grant injunction to stay waste. *Knight v. Duplest*, T. 1751, 2 *Ves.* 360.]

[If a bailiff cuts timber without authority, and before it is sold the party dies, it is personal assets, and the heir has no action against the personal representative, nor is there any equity between them on the subject. Lord *Loughborough C. Oxenden v. Ld. Compton*, 2 *Ves.* 74. 4 *Bro. C. C.* 231. 397. S. C.]

(3 Q) Ideot.

[THE power of justices of peace does not extend to lunatics, whose relations are in a condition to apply to Chancery. *Anon. T. 1740, 2 Atkyns, 52. Vide Ideot (C).*]

If a commission is granted to A., Chancery at discretion may afterwards commit the custody to another. *Semb. 1 Ver. 262.*

But will not change it, upon a petition by the next of kin, because that the inheritance may descend to the committee, or that the maintenance is too large. *2 P. W. 263.*

[Notice of passing accounts of lunatic's estate should 'always be given to such relations as would be entitled to a share if he died intestate; but they are not allowed costs of attendance unless for special cause. *Ex parte Wright, T. 1750, 2 Vef. 25.*]

[If a lunatic has estates both in England and Scotland, a proportion from each should be allowed for his maintenance. *M. Annandale v. Marchioness of Annandale, T. 1751, 2 Vef. 181.*]

[The court will (on circumstances) order the bond given by committee to be delivered up, and less security taken. *Ex parte Northleigh, T. 1755, 2 Vef. 673.*]

[So, will order it to be delivered up, on a greater security being given; but such applications are not encouraged, as the lunatic might be without remedy for the time past. *Ex parte Pereira, T. 1755, 2 Vef. 674.*]

A committee cannot make an incumbrance upon the estate of an ideot, without an order of court, by mortgage or otherwise; for he has but an estate at will. *1 Ver. 262.*

[Committee on lunatic's real estate may cut down timber on it for repairs; and if they have bought timber, they shall make good the money to the personal estate. *Ex parte Ludlow, T. 1742, 2 Atkyns, 407.*]

So, if A. before his lunacy makes a mortgage, the committee cannot join in an assignment for a greater sum. *R. 1 Ver. 262.*

So, he cannot make leases. *1 Ver. 262.*

Nor, demand an allowance for improvement of the estate by building on it. *1 Ver. 263.*

If A. is found a lunatic from such a day, without intervals, all alienations by him, after that day shall be avoided. *2 Ver. 678. Vide 2 Ver. 414.*

So, a purchase from him at an under-value, tho' confirmed by fine and recovery, upon repayment of so much as was duly advanced with interest. *2 Ver. 678.*

[Produce of timber on the estate of a lunatic cut and sold by order or report, that it would be for his benefit, held to be personal assets, and not to be transmuted for the benefit of the heir: that there is no equity between the real and personal representatives, both are volunteers, and must take what they find at the lunatic's death, in the condition in which they find it. *Oxenden v. Lord Compton, 2 Vef. jun. 69.*]

[Where timber makes part of a general rental of a lunatic's estate, it is the duty of the administrator to manage it in the usual manner. *Ibid.*]

[In managing the estate of a lunatic the general principle is to attend solely to the interest of the owner, without looking to the interests of those in succession. 2 *Ves. jun.* 72.]

[The court may apply his personal estate in payment of his debts to any extent, and may do whatever tends to the ordinary improvement of his property. *Ibid.* 73.]

[Committee of lunatic's estate not permitted to pass his accounts without inquiry what money in his hands from time to time; master to state particular circumstances. *Ex parte Cotton*, 1 *Ves. jun.* 156. *Ex parte Chumley*, *ibid.*]

[Lunatic is to have every comfort his situation and fortune will admit, without any regard to expectants. *Ex parte Chumley*, 1 *Ves. jun.* 296.]

[The court may convert property for lunatic's manifest benefit. *Ibid.* 462.]

[Equity will recal for the representative property converted, if done by breach of trust, not if by accident, or the tort of a stranger. *Ibid.*]

[Timber on the estate of a lunatic cut under an order of the court, and sold, and the produce paid into the bank on account of the lunatic; after his death on petition by his heir for the money, the lord chancellor on account of its consequence, and the difficulty of reversing an order made on petition, refused to give the money to either representative without a bill. *Ex parte Bromfield*, 1 *Ves. jun.* 453. 3 *Bro. C. C.* 510. *S. C.*]

[General principles in cases of insanity stated. *The Attorney-General v. Parnter*, 3 *Bro. C. C.* 441. See also *ibid.* 409. *S. C.*]

[To keep a commission of lunacy unexecuted for any long time is a contempt. *Anon. T.* 1740, 2 *Atkyns*, 52.]

[If there is a misbehaviour in executing an inquisition of lunacy, the court may quash it, and direct a new commission; but a *novus inquirendum* is only grantable on the part of the crown, who cannot traverse as a subject can. *Ex parte Roberts*, *M.* 1743, 3 *Atkyns*, 5.]

[If the lunatic appears better on an inspection after the inquisition taken, the court will grant a traverse, and suspend the grant of the custody till further order. *Ibid.*]

[Whether the party can have a traverse without applying to this court? *Qu. Vide Cutt's Case*, *Ley*, 86. but without leave of this court the custody cannot be suspended. *Ibid.*]

[If the inquisition be to inquire whether *A.* is a lunatic, or enjoys lucid intervals, so that he is not sufficient for the government of himself and his affairs, and the return is, that *A.* is, from the weakness of his mind, incapable of governing himself, and his lands and tenement, it is an illegal and void return, and the inquisition shall be quashed. *Ex parte Barnesley*, *T.* 1744, 3 *Atkyns*, 168.]

[The above return is good in substance, tho' informal; and if a second inquisition is returned that he is of *unsound mind*, so that he is not sufficient to the government, &c. it is good, and after those two the court will not grant a traverse. *Ex parte Barnesley*, *T.* 1744, 3 *Atkyns*, 184.]

[Not only the lunatic, but the heir of the lunatic is bound upon the traverse of the inquisition. *Ex parte Roberts*, *H.* 1745, 3 *Atkyns*, 308.]

[The chancellor will on application make a provisional order, as to the effects of a supposed lunatic, till the lunacy is fully determined. *Ex parte Heli*, P. 1748, 3 *Atkyns*, 635.]

[A trustee reported by the master to be a lunatic cannot be ordered to convey under 4 Geo. 2. c. 10. unless a commission of lunacy has issued. *Ex parte Gillam*, 2 *Ves. jun.* 587. and *ex parte Peacock* there cited.]

[The court will direct one found *non compos* before a foreign jurisdiction (as the senate of *Hamburgh*) heir to a mortgagee, to convey, under 4 G. 2. c. 10. *Ex parte Otto Lewis*, T. 1749, 1 *Ves.* 292. *Vid.* 2 *Ves. jun.* 588.]

[If the supposed lunatic is abroad, the commission may be directed to the county in *England* where his mansion-house and estate lies. *Ex parte Southcot*, T. 1751, 2 *Ves.* 401.]

[The common form is not of necessity to be observed. *Ibid.*]

[The commissioners and jury have a right to inspect the person, but they are not obliged so to do. *Ibid.*]

[Not being able to answer the most common question touching figures, is not ground for a commission, if the party gives rational answers to other questions. *Lord Donegal's Case*, P. 1752, 2 *Ves.* 407.]

[A man's appearing not lunatic at one time does not prevent application afterwards; but if there has been a personal examination on the first, the chancellor will not proceed without new inspection. *Ibid.*]

[If a man is found an idiot *for so many years past*, it is good; for finding him an *idiot*, implies from his birth; the rest is surplussage. *Ibid.*]

[Tho' a man is very weak, and a petition for commission is presented in the name of infants, whose remainder may be thereby defeated, the court will not grant commission, and the court will grant relief against deeds or will obtained from a man against whom it will grant a commission. *Ibid.*]

[A petition to supersede a commission, must be in the name of the person who had recovered sound mind. *Ex parte Stanley*, T. 1750, 2 *Ves.* 25.]

(3 R) Infant.

(3 R 1.) How he shall sue.

AN infant shall have the same relief in *Chancery* as another person. *Vide Pleader*, (2 C 1.)

And may sue by *prochein amy*, or guardian. *Vide Pract. Reg. in Chan.* 194.

Or, in person. *Vide Pract. Reg. in Chan.* 194.

So, a bill may be exhibited by any one, as *prochien amy* to an infant *in ventre sa mere*, and he shall thereupon have an injunction to stay waste. *Eq. Abr.* 71. 2 *Ver.* 711.

So, a bill for an infant by a *prochien amy*, without the consent of the infant, shall be allowed; for it is at his peril. *Mich.* 1713, *Eq. Abr.* 72.

[*Prochein amy* need not be a relation, but then he must be a person

son of substance, because liable to costs. *Anon. H. 1737, 1 Atkyns, 570.*]

So, a stranger may demand an account for an infant against his guardian, during his minority, tho' the infant himself cannot have an account against him till his full age. 2 *P. W.* 119.

[If a man leave a personal estate between his wife, whom he makes executrix, and two infant children, and a relation, as *prochien amy*, files a bill against the wife for an account; on affidavit of other relations, that the suit is not for infants benefit, the court will refer it to a master, and on his report to that effect, stay proceedings. *Da Costa v. Da Costa, P. 1732, 3 P. W. 140.*]

If there be a mistake by the offer of an infant in his bill; the court will take care of him, and direct an amendment of the bill. 2 *P. W.* 386, 7.

[On extraordinary circumstances, the court will give an infant plaintiff a day to shew cause. *Bennet v. Lee, H. 1742, 2 Atkyns, 529.*]

But when an infant sues, he shall have no other privilege, than a man of full age; for he shall pay costs, and if he claims by a will, there is no need of proof as to himself. 2 *P. W.* 519.

[On a bill filed by *prochien amy*, an infant pays no costs. *Turner v. Turner, T. 12 G. Str. 708.*]

[*N. B.* The contrary was ordered at first, whereupon plaintiff obtained a re-hearing as to the point of costs, when it was ordered as here reported. This is probably the reason why this case is wrong reported in 2 *P. W.* *Select Cases in C., &c.*]

(3 R 2.) How he shall be sued.

If an infant is sued, the court will appoint a guardian to defend him. *Vide Pract. Reg. in Chan. 194, 5. Vide Pleader, (2 C 2.)*

Or, he may answer in person. *Vide Pract. Reg. in Chan. 194.*

[Infancy of defendant no excuse for plaintiff's delay. 2 *Vef jun. 14.*]

[An infant when he comes of age is entitled to put in a new answer, and make a better defence if he can. *Bennet v. Lee, H. 1742, 2 Atkyns, 529.*]

[An infant may also apply to put in a better answer during his infancy, where he might not be able to come at the same evidence when he shall be of age; as, if the necessary witnesses are old. *Ibid.*]

And may be compelled to the performance of a decree. *Vide Pract. Reg. in Chan. 195.*

And shall be committed, if he disobey it. *Ibid.*

If he sues by *prochien amy*, and after his full age he does not proceed, whereby his bill is dismissed; he shall pay costs, and take his remedy against his *prochien amy*. 2 *P. W.* 297. [*Vide supra,* (3 R 1.)]

(3 R 3.) What Things he shall be decreed to do during his Infancy.

(3 R 3.) *To perform a trust.*] If land is conveyed by trustees to an

an infant, he shall be compelled to perform the trust during his minority. *Semb. 1 Ver. 343.*

So, if land is given to him for payment of an annuity to another, he shall be compelled to pay it and the arrearages. *Tot. 171.*

So, if there be a bond for the money of *A.* in the name of an infant; upon payment to *A.* the infant shall be stayed from suing.

So, by the *st. 7 Ann. 19.* an infant trustee may, on petition and reference to a master, be ordered by the court to assign his trust.

[Tho' the trust estate be abroad; for the order is merely personal on the trustee, and the words of the act are general. *2 Brown, 325.*]

[A mortgagee in fee devised to *A., B., and C.,* "and the survivor and the heirs of such survivor." The infant heir of the testator was directed to join in re-conveying to the mortgagor, as having the fee in him during the joint lives of the devisees. *Ex parte Harrison, 3 Anstr. 836.*]

[By *st. 4 G. 3. c. 16.* the powers of *7 Ann. c. 19.* are granted to the courts in the counties palatine and *Wales,* with respect to lands in them severally.]

[The *st. 7 Ann. c. 19.* extends only to plain and express trusts, not to such as are implied or constructive only. *Goodwin v. Lister, M. 1735, 3 P. W. 387.*]

[Therefore if *A.* covenants to convey, dies, and the premises descend to *B., C., and D.* an infant, *B. and C.* shall convey immediately, and a day be given to *D.* to shew cause within six months after he is of age. *Ibid.*]

[Or, if lands in fee are devised to infant, charged with debts and legacies, the infant shall not be decreed to join in sale of so much and such part as shall be sufficient and fit to be sold to pay, but the master shall report, and the infant convey when of age, unless he shew cause in six months. *Anon. T. 1730, 3 P. W. 389.*]

[An infant trustee shall not be decreed to convey, if there is a doubt whether he has an interest of his own in the estate, unless on proper suit. *Hawkins v. Obeen, T. 1754, 2 Ves. 559.*]

And to levy a fine, if it be necessary for an effectual assignment; as, if she be a *feme-covert.* (*Vide Com. Rep. 615.*)

[The court will order an infant who is a *feme-covert,* and heir of a mortgagee in fee, to convey by fine, the husband consenting by council, for affidavit of service on him is not sufficient. *Ex parte Mairs, P. 1747, 3 Atkyns, 479.*]

[The court will order an infant trustee to convey by common recovery; for the act is general, that he shall convey as the court shall direct. *Ex parte Johnston, T. 1747, 3 Atkyns, 559.*]

[On application for an infant trustee to join in suffering a common recovery, the court will order all parties to concur in all necessary acts for the infant's suffering it, as it is doubtful whether he can do it without a privy seal. *Ex parte Bowes, T. 1744, 3 Atkyns, 164.*]

But this ought to be done, where the trust is manifest; for if the trust is not in writing, there shall be a decree upon a bill. *2 P. W. 549.*

So, a decree for the sale of an estate for payment of debts, binds infants. *1 Ver. 295;*

So,

So, an infant shall be foreclosed, if he does not redeem a mortgage during his infancy. 2 *Vent.* 351.

But if the title is dubious, he shall not be foreclosed, till his full age; for no money can be expected on the assignment. *Ibid.*

[See also 3 *Ves. jun.* 317.]

And if he be foreclosed, he shall have a day allowed him, after his full age. 1 *Ver.* 295.

So, if he be decreed to join in a sale, he shall have a day to shew cause to the contrary, after his full age. 2 *Ver.* 429.

So, if it be decreed that any one shall hold and enjoy land against him. 2 *Ver.* 479.

A decree for the confirming or avoiding of a will, where an infant is heir or devisee, shall be final, and binds the infant. *R. Eq. Ca.* 128.

[An infant is bound by an order made by the court by consent, tho' there was no reference to the master to inquire whether it would be for his benefit. 1 *Brown*, 484.]

[The inheritance of an infant is never bound by any discretionary act of the court, tho' as to personal things it has been done. *Taylor v. Philips*, T. 1750, 2 *Ves.* 23.]

[See *ex parte Sergison*, 4 *Ves. jun.* 147.]

(3 R 4.) *To do his duty.*] So, an infant shall be compelled to give a discharge for money paid to him.

So, an infant executor shall be compelled to the payment of debts.

If *A.* gives a lottery ticket upon condition, that the donee shall divide all above 20 s. with *B.*, the donee shall be decreed to divide tho' he is an infant. *R.* 2 *Ver.* 560.

(3 R 5.) *Or, a thing for his advantage.*] So, an infant shall be compelled to the performance of his agreement, if he had an advantage by the means of such agreement; as, if the eldest son promise to his father to give 100 l. to the younger son, if the father will desist from making a settlement, which he intended on the younger son, by which means, the father does desist from the settlement; tho' the eldest son was an infant, he shall be compelled to pay the 100 l.

So, equity usually regards that interest which is most beneficial for the infant. 1 *Ver.* 252.

[The marriage-settlement of a female infant is binding on her, and no act done by her and her husband can avoid it. 1 *Brown*, 106.]

[But it must be fair and reasonable, not tending to deprive her of every thing; therefore, a covenant that whatever should come to the wife, or to the husband in her right from the mother or otherwise, should be bound by the settlement, was confined to what came from the mother, and not extended to property coming from other quarters. *Id.* 152.]

[So, a settlement by a woman adult in contemplation of marriage with a male infant, in which he joined, held binding upon him. 1 *Ves. jun.* 28.]

[If an estate is conveyed in trust, to be sold to pay incumbrances then affecting it, &c. the residue in trust for grantor and his heir, and

and bill be brought by a subsequent bond-creditor to have the estate sold, prior incumbrances paid, and then his debt; and the heir by answer insists, that being an infant the parol ought to demur, tho' it is to the infant's prejudice, and his counsel would waive it, yet as it has been mentioned the court cannot avoid ordering it. *Scarth v. Cotton*, T. 9 G. 2. C. E. T. 198.]

[But if *A.* before marriage covenants with trustees to pay them a sum to be laid out in lands for *B.*, his wife's jointure, and he afterwards settles certain lands for her jointure, and by will confirms it, and directs them after her death to be sold, and the money divided between *C.* an infant, his heir at law, and five others, and *B.* brings bill refusing the lands so settled, and insisting on the performance of the covenant before marriage, and that these lands shall be sold for that purpose, and it is for the infant's benefit that the lands should be now sold; the court will decree it, as there is a trust to be performed, but does not mean to break in on the rule of the parol's demurring. *Uvedale v. Uvedale*, T. 1744, 3 Atkyns, 117.]

If an infant by his answer offers other lands for security of portions to his younger brothers, to prevent a sale of the lands charged, and does not immediately upon his coming of age retract his offer, he shall be bound thereby. 2 Ver. 224, 5.

So, building-leases, for the advantage of an infant, are decreed. 2 Ver. 225.

So, an exchange made during the minority of an infant, if he continues in possession after his full age. *Ibid.*

But, generally, an infant shall not be compelled to make good his agreement.

[Not bound by his covenant. 1 Ves. jun. 314.]

[The court will not give a maintenance for the time previous to the report of the father, not being of ability to maintain the children, except under very special circumstances. *Andrews v. Partington*, 3 Bro. C. C. 60.]

[The court will not direct money to be paid out to an infant executrix, but will refer it to the master to inquire whether there are any debts or legacies, and to consider of a maintenance. *Campart v. Campart*, 3 Bro. C. C. 195.]

[No maintenance shall be given when the parent is of ability to support the children. *Pulsford v. Hunter*, 3 Bro. C. C. 416.]

[Altho' where fortunes are given to children (living the father) with provisions for maintenance, that shall not be raised but accumulate while the father is of ability to maintain the children; yet, where the lady's fortune, on a second marriage, was settled to the use of herself for life, remainder to the children of a marriage making a provision for a maintenance out of the interest of the fund, the court ordered an allowance to be made. *Mundy v. Earl Howe*, 4 Bro. C. C. 223.]

[If one on coming of age gives a note for liquors, &c. which he had before of age, and whilst at school, no account being produced; the court will order the note to be delivered up, but will not injoin the donee from suing at law as for necessaries. *Brooke v. Gally*, P. 1740, 2 Atkyns, 34.]

So, he shall not be compelled to pay a debt out of real assets, during his minority. *Dub.* 1 Ver. 428.

But

But a decree against him during his infancy shall not be avoided, if it was not obtained by collusion, tho' not equal. *P. W.* 734.

(3 R 6.) Maintenance of Infants.

If an estate is devised or settled for the benefit of children, who are infants, the court may allow how much shall be applied for their maintenance. *Vide 2 Ver.* 236.

[If the parent be of ability to maintain his children, he shall not have an allowance for that purpose out of the interest of a fortune coming *aliunde*, tho' it was ordered by the will to be applied to maintenance. *1 Brown.* 387.]

[The maintenance ordered by the court never can be from a past time: it is the duty of a father to maintain his child, and the allowance cannot be so ordered as to pay him for maintaining the infant for a past time. The master, if he see the pressure of the parent's circumstances, may consider it, in the rate of the allowance, but cannot make allowance for the time past. *2 Brown,* 231. *1 Brown,* 387.]

[But the mother having married again, the second husband is not bound to maintain the children of the former marriage, but shall have an allowance out of their fortunes. *1 Brown,* 268.]

[The court may appoint a guardian and maintenance on petition, tho' no cause is depending. *Ex parte Odel,* *T.* 1731, *ex parte Peplow,* *T.* 1734, *Tenham v. Barret,* *M.* 1723, and *P.* 1724, *ex parte Whitfield,* *T.* 1742, *2 Atkyns,* 315. *Ex parte Kent,* 3 *Bro. C. C.* 88. *Ex parte Salter,* at the Rolls, 3 *Bro. C. C.* 500.]

[The court will not confirm a testamentary guardian, nor refer an infant's maintenance to a master on petition; there must be a bill. *2. Ex parte Ricards,* *T.* 1747, 3 *Atkyns,* 518.]

[A receiver of an infant's estate is never appointed when no bill is depending; but if it is only filed, there may be an application for one on infant's behalf. *Anon. P.* 1738, *1 Atkyns,* 489. 578. *Ex parte Whitfield,* *T.* 1742, *2 Atkyns,* 315.]

[Allowance of maintenance to a guardian demanded afterwards must be in regard to what the infant had, at the respective times for which such maintenance is to be. *Chaplin v. Chaplin,* *T.* 1735, 3 *P. W.* 365.]

And maintenance shall be allowed by consent of the relations, tho' there is no provision for it; for the court by natural equity has power to make an allowance. *R.* 2 *Ver.* 236.

So, if there is an elder son an infant, and other younger children, who have no provision; the court will allow a more ample maintenance to the guardian, by which the younger children may be maintained. *2 P. W.* 22.

[Where there is a numerous family of children, the court will order a liberal allowance for an eldest son, to enable him as head of the family to maintain his brothers and sisters; but if he is conveyed clandestinely to a seminary abroad, they will allow nothing, but direct the rents and profits to be laid out for his benefit. *Petre v. Petre,* *P.* 1747, 3 *Atkyns,* 511.]

So, if a sum of money is bequeathed to an infant at such an age, or to be paid at his full age; the interest shall be applied for his maintenance

tenance in the *interim*. R. 1 Ch. R. 265. 2 P. W. 22. *Vide post*. Legacy, (3 Y 9.)

And if no interest is payable, the court will direct part of the principle to be paid, for which interest shall be deducted by him who pays it, out of the residue on payment thereof. 2 P. W. 23.

But if the estate be small, the lower interest shall be paid. 2 P. W. 22.

So, if a term is created to raise maintenance, and the estate is incumbered with a mortgage, which the rents cannot pay; a mortgage of the term shall be decreed. 1 P. W. 490.

But this shall not be done without necessity, or if the parent is able to maintain the infant. 1 P. W. 493. [*Jackson v. Jackson*, P. 1737, 1 *Atkyns*, 513.]

But if a legacy is given to an infant, his guardian cannot disburse out of the principal sum for his maintenance. *Vide ante*, (3 O 1, 2.)

So, if 500 l. is devised to be paid out of land vested in trustees by deed, for the portion of a daughter at her full age, and if she dies before, to another person; tho' nothing is devised besides that, and she cannot have the interest, yet nothing shall be deducted out of the principal for her maintenance, in respect of the devise over. R. Ca. Ch. 249.

[If a freeman of London devises a sixth part of his customary estate to his daughter, and directs it to remain in the mother's hands till twenty-one, or marriage, and devises the residue of his estate to his wife, desiring her to take the trouble and *expence* of maintaining her till twenty-one, or marriage; her maintenance shall be paid out of the produce of the capital of her orphanage part, then out of the residue of the legatory part. *Coomes v. Elling*, H. 1747, 3 *Atkyns*, 667.]

[Where a father provided by his will a maintenance for his second son, out of his real estate, and afterwards gave large legacies to his younger children, with maintenances out of the interest, it was held that the second son was entitled to both maintenances. 1 *Brown*, 146.]

[The court will not give a special direction to the master in settling an infant's allowance, to consider the birth of a posthumous child. *Id.* 179.]

(3 S) Interest for Money.

(3 S 1.) At what Time it commences.

IF money is borrowed upon mortgage, bond, note, &c. the interest thereof commences upon the execution of the security, and loan of the money. *Vide Eq. Abr.* 286.

[A bond, dated on a day certain in a penal sum, conditioned for payment of a less sum generally, without naming any day of payment, carries interest from the day of the date, tho' not expressly reserved. *Farquhar v. Morris*, B. R. H. 37 Geo. 3. 7 T. R. 124.]

[A power to charge a sum in gross, implies a power to give any rate of legal interest, and the rule of the court to give 4 per cent. applies

plies only where no rate is specified by the party having power to fix it. *Lewis v. Freke*, 2 *Ves. jun.* 507.]

[The reason of that rule is, that money is generally to be had at that rate: but the rule is not invariable. *Ibid.* 511.]

[Money disbursed by a mortgagee shall carry the same interest as the original sum. *Woolley v. Drag*, 2 *Anstr.* 551.]

If portions are provided for children, and no maintenance given till the time of payment, the interest of the portions shall be allowed for maintenance.

Or, if a woman has land for her jointure, out of which they are payable; she shall maintain her children in the interim. *Eq. R.* 93.

So, if money is detained by wrong, interest shall be paid. *Per Cowper*, 1 *P. W.* 396.

If a legacy is given, with a certain day limited for the payment, interest shall be paid from the day limited, if the legacy is not then paid. *Tr. Eq.* 119. *Vide Sal.* 415, 16. *Eq. Abr.* 286. *Vide post.* (3 Y 9.)

[If *A.* by will creates a term for payment of debts and legacies, and orders them to be paid in five years; and by codicil gives the same estate to trustees to pay 300*l.* *per ann.* to his wife, and with the surplus to pay debts and legacies with all speed; a legacy shall bear interest from the end of the five years, a debt from the time it is liquidated. *Lloyd v. Williams*, *M.* 1740, 2 *Atkyns*, 108.]

If no time is limited, interest shall commence from the exhibiting of a bill for it; or, if the devisee is an infant, from a year after the death of the testator. *Tr. Eq.* 119. *Vide post.* (3 Y 9.)

[If a trust is created to raise 20,000*l.* to be applied to certain purposes, and the residue to *A.*; he dies, and afterwards act of parliament declares said 20,000*l.* to the personal estate of *A.* liable to his debts, the residue to be distributed; and afterwards there is a decree for payment of debts, and one-third of residue to be paid to *A.*'s widow, and two-thirds to be placed out for his daughter an infant, and this is neglected by the widow's second husband (who is in possession) for many years, interest shall be paid from the decree. *E. Pomfret v. Ld. Windsor*, *T.* 1752, 2 *Ves.* 472.]

If a legacy is payable out of the reversion of an estate for the life of another, tho' it cannot be raised immediately, whenever it can be raised, the interest shall be paid from the time when the legacy was directed by the will to be paid. *R. Eq. R.* 89.

[A residue being devised to an infant with remainder over, in case she should die under age, which she did; the interest between the death of the testator and that of the infant, shall go to her representative. 1 *Brown*, 82.]

[If the trust of a reversionary term after a grandfather's death in marriage-settlement is to raise portions for daughters, payable at twenty-one, or marriage; and in the settlement there is provision for maintenance for daughters, which is not to be raised till after the grandfather's death, but no such exception as to the portions, the portion vests from the marriage, and bears interest from that time, in the life of the grandfather. *Lyon v. D. Chandos*, *H.* 1746, 3 *Atkyns*, 416.]

If

If a legacy is given by a father, to be paid at a future day, interest shall be paid in the *interim*; for by the law of nature he ought to maintain his son, &c. in the meantime. *Tr. Eq.* 119.

Otherwise, if given by a stranger. *Ibid.*

[If a man having an estate in the funds, and shares of ships, devises 4000 *l.* to trustees, to be applied as he shall appoint, and by codicil appoints it to the use of *A.* aged five, his maintenance and education to be paid out of the interest, interest shall commence from testator's death. *Beckford v. Tobin, M.* 1749, 1 *Ves.* 308.]

[If such legacy is not separated from the bulk of the estate, and it appears that if it had, and had been laid out, it would not have produced more than 4 *l.* *per cent.* the court will give only 4 *l.* *per cent.* tho' charged on personal. *Ibid.*]

[If a portion is to be paid at twenty-one, with interest, at 5 *l.* *per cent. per ann.* from the death of the father to the payment thereof, the interest shall be paid annually, and not accumulate till the portion is payable. *Boycot v. Cotton, M.* 1738, 1 *Atkyns*, 552.]

If an annuity is devised or agreed to be paid at *Mich.* and *Lady-day*; if there is an arrear, interest shall be decreed from the day of payment. *R.* 1 *P.W.* 543.

If an account is stated by a master, interest shall be paid for the balance. 1 *P.W.* 480. 653.

But if the debt is not ascertained till the master's report, interest shall be allowed only from the report confirmed. 1 *P.W.* 377.

If a loan is made beyond sea, the same interest shall be paid as there, deducting the charge of the return. 1 *P.W.* 396.

[If a bond is given in *Ireland*, tho' for a debt contracted in *England*, it shall carry *Irish* interest. *Connor v. E. Bellamont, T.* 1742, 2 *Atkyns*, 382.]

Yet where a portion was charged upon an estate in *Ireland*, by a settlement and will made in *England* between parties here; it was decreed to be paid with *English* interest, without deduction for the charge of the return. 1 *P.W.* 696. *Vide* 2 *Ver.* 395.

[If a contract is made in *England* for a mortgage of a plantation in the *West Indies*, only legal interest shall be paid; and if there is a covenant for more, tho' only the interest where the land lies, it is usury; therefore the place where the contract is made, not where the security lies, or where the debt was contracted, determines the rate of interest. *Stapleton v. Conway, P.* 1750, 3 *Atkyns*, 727. 1 *Ves.* 427.]

[If money is due on covenant at 6 *l.* *per cent.* and decreed, and a report ascertains the whole sum and interest thereof at the then legal interest of 6 *l.* *per cent.*, and afterwards bill is brought for payment of this accumulated sum and interest, the interest on the principal shall be at 6 *l.* *per cent.* to the time it is paid, on the interest at 6 *l.* *per cent.* till the reduction of interest, and then at 5 *l.* *per cent.* *Astley v. Powis, T.* 1750, 1 *Ves.* 483. 495.]

[If a father on his son's marriage covenants to give or leave him 4000 *l.* and interest is not mentioned, he shall have interest at 5 *l.* *per cent.* from the father's death. *Swynfen v. Scarwen, T.* 1748, 1 *Ves.* 99.]

[A legacy for mourning out of personal estate carries interest at 5 *l.* *per cent.* *Ibid.*]

[If a mortgage carries interest at four and a half, with proviso, that if half year's interest is paid before the third quarter becomes due, the mortgagee will accept of 4 *l.* if the mortgagor fails payment, the court cannot relieve him against the half *per cent.*; otherwise, if it was made at 4 *l. per cent.*, with proviso, that if not paid at the time it should be more, for that is but a *nomine pœna*. *Nicholls v. Maynard*, T. 1747, 3 *Atkyns*, 519.]

[If a stated sum is reported due for principal and interest on a mortgage on an estate to be sold, and there are other mortgagees and creditors, it shall carry interest at 4 *l. per cent.* only, from confirming the report, tho' the mortgage was at 5 *l. per cent.* *Harris v. Harris*, H. 1750, 3 *Atkyns*, 722.]

[If portions are by will charged, first on personal, and then on real estate, with interest for their maintenance; so far as the personal is deficient, the interest shall be at 4 *l. per cent.* *Ld. Trimlestown v. Colt*, T. 1749, 1 *Ves.* 277.]

[If an account is directed of money which by marriage articles is to be laid out in land, part for a jointure, and decree directs it should answer interest, without saying at what rate, it shall be only 4 *l. per cent.* *Denton v. Shellard*, H. 1750, 2 *Ves.* 239.]

[In a bankruptcy, no interest allowed beyond the penalty of a bond. 2 *Ves. jun.* 501.]

[A mortgagee had also a bond, on which the interest due exceeded the penalty; the mortgagor conveyed the equity of redemption for the use of his creditors, paying this bond first. Nothing beyond the penalty can be claimed. *Lloyd v. Hatchett*, 2 *Anstr.* 525.]

(3 S 2.) No Interest beyond the Penalty.

But generally, interest shall not be allowed in equity, beyond the penalty of the security; and the party makes the penalty the measure of his damage for non-payment. *Tr. Eq.* 118. *Eq. Abr.* 288. [3 *Br. C. C.* 496.]

Yet interest has been carried beyond the penalty, where the bond is only a collateral security for the money. *Tr. Eq.* 118.

Or, the party hath made great advantage by the detainer. *Ibid.*

[Interest beyond the penalty was decreed to be paid. *Elliot v. Davis*, in *Sc. T.* 1718, *Bunb.* 23.]

[A creditor on a judgment is not confined to the penalty, but may carry the computation of interest beyond it. *Godfrey v. Watson*, P. 1747, 3 *Atkyns*, 517.]

[Bond, and judgment assigned; interest must be calculated to the date of the report, so as not to exceed the penalty. *Sharpe v. Earl of Scarborough*, 3 *Ves. jun.* 557.]

(3 S 3.) Nor Interest upon Interest.

So, generally, interest upon interest shall not be allowed. *Tr. Eq.* 119. *Vide post.* (3 S 4.) [See also *Waring v. Cunliffe*, 1 *Ves. jun.* 99.]

And if interest is computed for interest, tho' the debtor agreed to pay more, if not paid within three months, he shall be aided, where there is only a small arrear. 1 *P. W.* 653.

[But where tenant for life renews and pays fines with interest for

for a certain number of years, on the amount of those fines, in settling the proportion of the money between his representatives and the remainder-man, they shall be allowed interest on the interest on the fine; but as it cannot be supposed that the interest on the fine was paid exactly at the day, the interest allowed on the interest shall be only at the rate of *4 l. per cent.* 1 *Brown*, 443, 444.]

[When subsequent interest is directed to be computed, it is the course of the court, in case of a mortgage, to compute such interest on the principal and interest reported due, but in the case of bonds and legacies, to compute it on the principal only. 1 *Brown*, 574. *Vid.* 2 *Ves.* 471.]

[If a mortgagee, where the interest is four and a half *per cent.* at every six months turns the interest into principal, and charges *5 l. per cent.* on the interest so turned into principal, and when the mortgage is paid off with six months' notice, charges double interest for the last six months, on pretence it was so agreed for services done as a counsel, the mortgagor shall be relieved. *Thornhil v. Evans*, T. 1742, 2 *Atkyns*, 330.]

[If arrears of interest are due when a mortgage is paid, the mortgagee shall never be allowed interest for this interest. *Ibid.*]

[If interest is not regularly paid, it may upon agreement be turned into principal; but then it must be done fairly, and is generally on the advance of fresh money, and even then it is reckoned a hardship on the mortgagor, and an act of oppression. *Ibid.*]

So, no interest shall be allowed for a sum due, tho' the party by letter prayed forbearance. R. 1 *P. W.* 653.

But if a mortgagee assigns with the assent of the mortgagor; the assignee shall have interest for the sum by him paid for principal and interest. *Tr. Eq.* 120.

So, tho' the assignment is made without the joining of the mortgagor. *Dub. Tr. Eq.* 120.

[If a mortgage is assigned for as much as the principal and interest come to, but without privity of mortgagor, interest shall be carried on only on the principal; but if the mortgagee had applied for payment, and the mortgagor refused it, interest shall be carried on, on both principal and interest, whether the mortgagor join or not. *Anon.* in *Sc. P.* 1719, *Bunb.* 41.]

So, interest shall be allowed for the balance of a stated account, tho' interest is computed in the account. *Tr. Eq.* 120.

[Compound interest may be due by contract, either express or implied, from the nature of the transaction. R. without relation to interest on mortgages. 2 *Ves. jun.* 20.]

So, for the gross sum payable on a mortgage, tho' it includes the interest. *Semb. Tr. Eq.* 120.

(3 S 4.) When Interest shall not be allowed.

Chancery has power, upon circumstances, to abate or discharge interest due. *Ca. Ch.* 106.

As, after tender and refusal of the mortgage money, the mortgagor shall be discharged of the interest upon an *affidavit* that he made no advantage afterwards of the money. *Vide post.* (4 A 6.)

So, if money due upon mortgage, &c. is paid to the scrivener, who put out the money, but had not the security, (which is not a good payment,)

payment,) the mortgagee shall have the principal, without interest. *Ca. Ch.* 94. 111.

[Purchase-money does not bear interest from the time of executing the articles, but the conveyance, and then not if vendor has not let vendee into possession; and after possession, the court will give such interest as is agreeable to the nature of the land. *Blount v. Blount*, P. 1748, 3 *Atkyns*, 636.]

[The advantage a purchaser receives from the wearing out of lives is not taken into consideration as a reason for him to pay interest. *Ibid.*]

So, where a debt is not well founded, the principal may be decreed, without interest. *Ca. Ch.* 106.

As, where a bond was given to an officer in the army, for his surrender. 1 *Ver.* 99.

Where a note is given for goods sold, &c.

[In a long unsettled partnership account, rendered intricate by the neglect of the party, he or his representative shall have no interest on the balance when settled. 1 *Brown*, 239. 2 *Brown*, 2.]

If a bond, &c. is given in *Turkey*, &c. interest shall be computed as payable there. *Tr. Eq.* 121.

So, if a bond is given in *England* for money due in *Ireland*, the interest shall be as payable in *England*. 2 *Ver.* 395. Vide 1 P. W. 696.

So, if a legacy is demanded by an infant, and the defendant, by his answer, says that he was always ready to pay, but that he could not be indemnified, by reason of the infancy of the plaintiff, and offers to pay; it shall be paid without interest. *R. Ch. R.* 264.

[Interest shall not be allowed on the arrears of an annuity, where the annuitant has not entred for default of payment. *Robinson v. Cumming*, T. 1742, 1 *Atkyns*, 409.]

[If a man by deed or will creates a trust term for payment of debts and legacies after his death out of real estate, so far as his personal estate is not sufficient, simple contract debts do not carry interest. *Barwell v. Parker*, T. 1751, 2 *Ves.* 363.]

So, upon a mortgage, if it is agreed that interest shall incur for the interest, if it is not paid at the time; interest shall not be allowed. *R. Sal.* 449. *Semb.* 1 *Ch. R.* 28.

So, if a man accounts for rents and profits, he shall not pay interest for the money received. 1 *Ch. R.* 184.

[For the sum is uncertain. *Countess Ferrers v. E. Ferrers*, M. 7 G. 2. C. T. T. 2.]

If there is an estate to *A.* for life, afterwards to *B.* in tail, and if *B.* dies without issue, that it shall be charged with 400 *l.* to *C.*, with interest, and so charged, to *D.* in tail; *B.* dies without issue before *A.*, there shall be no interest for the 400 *l.* till the death of *A.* *R.* 1 *Ch. R.* 212.

[If a widow possesses herself as administratrix of all her husband's effects, and carries on the business, but has not sold all the goods, her only fund for raising money; and has been guilty of no delay in the suit, she shall not pay interest for the money reported due. *Rymer v. Coleman*, M. 1742, 2 *Atkyns*, 439.]

[Interest is never charged on an executor who makes use of assets come to his hands in the way of his trade. *Child v. Gibson*, T. 1743, 2 *Atkyns*,

2 *Atkyns*, 603. *Vide* 1 *Brown*, 359. *contra*, and the general rule there laid down, that he shall be charged with interest for money employed in the way of his trade, from the time when the estate of the testator was clear.]

[If a debtor makes a creditor by note his executor, he shall not have interest; for he may fairly make a profit by testator's assets coming in. *Adams v. Gale*, M. 1740, 2 *Atkyns*, 106.]

[Interest is not allowed on arrears of jointure in general, tho' on a special case (as if jointress is obliged to borrow money at interest) it may. *Anon. T.* 1755, 2 *Ves.* 661.]

[A slight difference between the sums admitted and those reported to be in the hands of a trustee not sufficient to ground a direction for an enquiry what interest he made of the money. *Sammes v. Rickman*, 2 *Ves. jun.* 36.]

[On a bill by executors to have the assets administered, no interest allowable on a judgment on assets *quando acciderint*. *Deschamps v. Vanneck*, 2 *Ves. jun.* 716.]

[Nor, on any other judgment. *Ibid.* 719.]

[Interest refused, because not prayed by the bill. 1 *Ves. jun.* 426.]

[Interest of arrears of annuity in bar of dower refused. *Tew v. Earl of Winterton*, 1 *Ves. jun.* 451. 3 *Bro. C. C.* 489. S. C.]

[A purchaser of a reversion expectant on a term of years, held not liable to pay interest, or on increased price, for a part of the term elapsing before the completion of the purchase, the delay not having arisen from him. *Groussack v. Smith*, 3 *Anstr.* 877.]

[Bankrupt's estate shall pay interest when sufficient, without breaking in upon his allowance. *Ex parte Morris*, 3 *Bro. C. C.* 79.]

(3 S 5.) When it shall be allowed.

But where a debt is demanded in equity, the court usually gives interest.

If by devise 20,000 *l.* is given to *A.* to be paid 1000 *l.* annually; if it is not paid at the day limited, interest shall be allowed; for the sum and day of payment were certain. 1 *Sal.* 156. 1 *P. W.* 542.

And it shall be paid without allowance for taxes; for it is a sum in gross, and not issuing out of land. 1 *Sal.* 156.

[When the arrears of an annuity or rent-charge are a sum certain, or where there is a clause of entry, or *nomine pœna*, or some penalty on the grantor, which is relievable only in equity, there interest is decreed on arrears, but not otherwise. *Countess Ferrers v. E. Ferrers*, M. 7 G. 2. C. T. T. 2.]

[If an annuitant with power of entry in case of arrears, and to hold till paid all arrears, costs, and damages, enters, he shall hold till paid interest on the arrears down to the day. *Robinson v. Cumming*, T. 1742, 2 *Atkyns*, 409.]

[If an annuity is given for maintenance, and secured by bond with penalty, the court will decree interest on the arrears, to be computed at the end of each half year. *Newman v. Auling*, M. 1747, 3 *Atkyns*, 579.]

[Interest may be given for arrears of an annuity often demanded;

manded; if the demands do not appear at hearing, the court will reserve it till after account taken. *Stapleton v. Conway*, P. 1750, 1 *Ves.* 427.]

[So, interest paid after the rate of 8 *l. per cent.* since the *st.* 12 *Car.* 2. shall not be discounted towards satisfaction of the principal. R. 2 *Ver.* 42. 78. R. cont. 2 *Ver.* 145.

Tho' 5 *l. per cent.* is directed by deed to be allowed till a purchase, yet if the money has been laid out in government securities which produced but 4 *l. per cent.*, the court will reduce the interest to 4 *l. per cent.* *Letchmere v. E. Carlisle*, M. 1733, 3 *P. W.* 211. C. T. T. 80.]

[Where a portion is charged on land, and the will does not mention interest, the court will give only 4 *l.* tho' the legal interest is 5 *l. per cent.*; so, if charged on personal estates. *Guillam v. Holland*, T. 1741, 2 *Atkyns*, 343.]

[The court has never directed more than 4 *l. per cent.* interest in cases of money due generally, since *Ld. King* had the seals in 1725. *Wood v. Briant*, H. 1742, 2 *Atkyns*, 521.]

If a legacy is charged on personal estate, and interest directed, the court will order it at legal interest, if charged on real at 1 *l. per cent.* less. *Moore v. Moore*, M. 1746, 3 *Atkyns*, 402. *Bryant v. Speke*, M. 1748, 1 *Ves.* 171.]

If a legacy is demanded and there are assets, interest shall be allowed from the time of the bill. *Eq. Abr.* 286.

If an annuity is given to the heir at law of the devisor till 24, and he dies before, there being arrears due, interest shall be allowed on them to his representative from the time they are liquidated by the master's report. *Drapers' Company v. Davis*, T. 1741, 2 *Atkyns*, 211.

So, sometimes, from the death of the testator: as, where a legacy was given to an infant, tho' said that it shall be paid when the executor pleases. 1 *Ver.* 251. *Eq. Abr.* 286.

[Interest shall be allowed for portions given by a father immediately, and if they are scanty, and usual interest is risen, the court will give four and one half *per cent.* tho' charged upon land. *Inledon v. Northcote*, H. 1746, 3 *Atkyns*, 430.]

Where it is charged upon land in possession. 2 *P. W.* 26.

[If an appointment is made of money charged upon the real estate of an infant who dies, and the estate descends to his cousin, heir at law to the infant's father, and to the infant, interest shall be paid by such heir at law from one year after the appointment, and not out of the infant's personal estate. *Sergefon v. Sealey*, M. 1742, 2 *Atkyns*, 412.]

Or, upon personal estate, which consists in mortgages. 2 *P. W.* 27.

[A legacy out of a rent-charge shall carry interest, but not more than the rent will produce, *Stonehouse v. Evelyn*, P. 1734, 3 *P. W.* 252.]

So, if a legatee exhibits his bill, and no assets are discovered, and afterwards assets come to the hands of the executor, and a new bill is exhibited; the legatee shall have interest from the filing of the first bill; for that was a good demand. 2 *Ca. Ch.* 2,

[A por-

[A portion charged on a real estate carries interest in its nature, tho' not mentioned. *E. Pomfret v. Ld. Windsor*, T. 1752, 2 *Ves.* 472.]

So, if 1200 *l.* is devised for the portion of an infant at his full age; interest shall be paid in the *interim*. 1 *Ch. R.* 265. *Vide ante*, (3 *R.* 6.) *Post.* (3 *Y.* 8.)

If land is devised for payment of debts, interest shall be allowed for debts upon simple contract. 1 *P. W.* 229. 2 *P. W.* 27.

[If a man in his lifetime creates a trust for payment of debts contained in a schedule, simple contract debts therein carry interest; for it is in the nature of a specialty. *Barwell v. Parker*, T. 1751, 2 *Ves.* 363.]

If a legacy is payable out of a reversion, &c. or at no fixed time; interest is usually allowed from the end of one year after the death of the testator. 2 *P. W.* 27.

But if the money for a legacy is brought into court, the interest ceases till it is placed in a fund. 2 *P. W.* 27.

[Interest on a mortgage shall not be stopt but upon proper tender and notice; not on offer to pay the balance of what is due on the mortgage on one hand, and an open account on the other. *Garforth v. Bradley*, T. 1755, 2 *Ves.* 675.]

So, if an executor does not pay the money of an orphan in *London* to the chamberlain, within a convenient time, he shall pay such interest as the chamberlain should pay. 1 *Ch. R.* 108.

And he was decreed to pay 6 *l. per cent.* tho' the chamberlain pays but 5 *l. per cent.* 2 *Ca. Ch.* 170.

So, if the executor receives interest, or uses the money in trade, he shall pay interest. *R.* 1 *Ver.* 197.

[If an executor places out assets specifically devised, the court will oblige him to account for the interest he has made of these assets. *Child v. Gibson*, T. 1743, 2 *Atkyns*, 603.]

[If a receiver of the estate of an infant, who has no testamentary or other guardian, is directed to lay out the surplus rents with the approbation of the master, and does not do it, he shall pay interest at 4 *l. per cent.* till the infant comes of age; and this tho' the infant after coming of age has settled the accounts and admitted and received the balance. *Hicks v. Hicks*, M. 1744, 3 *Atkyns*, 274.]

[If a grandmother by deed-poll deposits 400 *l.* in the hands of *A.* for the use of *B.* if not otherwise provided for during his minority, with a clause that *A.* shall not be charged with interest, and 200 *l.* thereof was *B.*'s own money, recovered in a suit in which *A.* was solicitor, *A.* shall be charged with interest for that 200 *l.* and not for the other. *Brown v. Pring*, H. 1749, 1 *Ves.* 407.]

So, if a sum certain is covenanted to be paid, interest shall be allowed for it, tho' it sounds in damages. *Tr. Eq.* 118.

So, if due upon a security with a penalty. *Ibid.*

Or, upon a note for value received, usually. *Vide Tr. Eq.* 118.

[Tho' there is no evidence of agreement for interest on a banker's note, yet it may be allowed on circumstances; as, if a customer orders a sum to be wrote off from his cash account, and a note, or security given for it; and interest is afterwards paid on this sum for several years. *Jacomb v. Harwood*, P. 1751, 2 *Ves.* 265.]

[If a scrivener or attorney takes money, and gives a note to put it out to interest, he is chargeable with interest after a reasonable time, (as three months,) unless the client accepts the security and interest thereon. *Barwell v. Parker*, T. 1751, 2 Vef. 363.]

[A stated account carries interest, and there shall be no allowance for trouble (even in case of an administrator) unless it is demanded in a reasonable time. *Ibid.*]

[If a man makes lease with covenant for quiet enjoyment, and the tenant is evicted, and brings action against the executor, and recovers, and assigns the judgment, the assignee is entitled to interest, whether against heir at law, devisee, or trustee, for payment of debts. *E. Bath v. E. Bradford*, T. 1754, 2 Vef. 587.]

[Tho' formerly B. R. computed interest only to the commencement of the action, yet now they allow it to the time of giving judgment. *Robinson v. Bland*, M. 1 G. 3. 2 B. M. 1077.]

[Interest allowed on a written agreement to pay by instalments. *Parker v. Hutchinson*, at the Rolls, 3 Vef. jun. 133.]

[A receiver of a public trust, having a salary, making interest of balances in his hands, is accountable to the trustees for interest made *ultra* his salary. *Lord Lonsdale v. Church*, at the Rolls, 3 Bro. C. C. 41.]

[Executor keeping the money of testator longer than the exigencies of his affairs required, shall pay interest. But one executor shall not be answerable for the sums come to the hands of another, unless they have done joint acts. *Littlehales v. Gascoyne*, 3 Bro. C. C. 73.]

[Interest of legacies to be computed from a-year after the testator's death, unless some other time be appointed by the testator; but he cannot make an executor answerable for interest beyond what the law has done. 1 Vef. jun. 367.]

[Agent of administrator keeping money of the intestate in his hands which he had proposed to his principal to lay out in the funds, ordered to pay interest. *Browne v. Southouse*, 3 Bro. C. C. 107.]

[The court may give interest on farther directions. *Sammes v. Rickman*, 2 Vef. jun. 36.]

[Purchaser delaying payment must pay interest. *Child v. Ld. Abingdon*, 1 Vef. jun. 94.]

[Trustee having disobeyed an order to pay money into court, was charged with interest on the sum from the date of the order. *Ibid.* Vide also 1 Vef. jun. 452.]

[Where interest is not reserved by the decree it cannot be given on petition; the object of which is merely to carry the decree into execution; but on further directions the court may give interest, tho' it was not reserved. *Creuze v. Hunter*, 2 Vef. jun. 157. See also 4 Bro. C. C. 157. 316.]

[Where demands on legacies and annuities charged on land, (one of which was a provision for a widow,) were liquidated by the report, claim of interest from its confirmation refused, since they do not in their nature carry interest. *Ibid.*]

[On mortgage, the whole sum liquidated by the report bears interest. *Ibid.*]

[No interest is computed on simple contract debts by the report, or by subsequent order. *Ibid.*]

[And

[And on bonds only up to the penalty. 2 *Ves. jun.* 157.]

[In case of a surplus in a bankruptcy creditors shall have interest up to the time of payment, where it appears to be due *ex contractu* either on the face of the security, or by other evidence. *Ex parte Mills*, 2 *Ves. jun.* 295.]

[Interest given for a simple contract debt. 1 *Ves. jun.* 63.]

[Receiver shall pay interest for money kept in his hands, tho' only a quarter of a year after it ought to have been paid into court. *Fletcher v. Dodd*, 1 *Ves. jun.* 85. See also *ex parte Cotton*, *ibid.* 156. and *ex parte Chumley*. *Ibid.*]

[Assignees of bankrupt not making a dividend when they ought, are liable at least to interest at 4 *per cent.*, which may be increased upon circumstances. In the bankruptcy of *Hilliard*, 1 *Ves. jun.* 89.]

[If it be necessary for *A.* to keep money at his banker's, and he uses *B.*'s money for that purpose, it is making advantage of it. *Ibid.* 90.]

(3 S 6.) When a Payment shall be intended for Interest.

If a debtor pays a sum upon a mortgage or bond, less than the interest due; it shall be intended for interest, and not for the principal. *Ca. Ch.* 24. 106. 1 *Ver.* 24. *Vide post.* (4 D 1.—4 F.)

So, if land is devised to a daughter, or to trustees, till 3000*l.* paid for a portion by him in the remainder; the profits do not sink the principal sum till one third, above the interest, is raised. *Tr. Eq.* 121.

If interest is reserved at 6*l. per cent.*, with an agreement, that if it is paid by such a day, it shall be taken at 5*l. per cent.* If not paid, interest at 6*l. per cent.* shall be decreed. 2 *Ver.* 290.

But if interest is reserved at 5*l. per cent.*, with a covenant to pay 6*l. per cent.* if the 5*l. per cent.* is not paid at such a day; only 5*l. per cent.* shall be decreed; for the other is in the nature of a *nomine pœna*. *R.* 2 *Ver.* 289. *R.* 2 *Ver.* 316. *But a qu. made.* *R. cont.* 2 *Ver.* 134.

[If a man gives a woman who cohabits with him a bond for 2000*l.* and interest during her life, and then to her children, but maintains her till his death, such maintenance shall be deemed in lieu of interest. *Lloyd v. Carter*, *M.* 1740, 2 *Atkyns*, 84.]

(3 T) Interpleader; Bill of.

[If an action is against a tenant by two persons, who claim his rent; he may exhibit his bill of interpleader, and bring his rent into court, and after the contest determined, between the defendants, have his costs, if he is in no default. *Vide Practical Register in Chancery*, 38, 9.]

[Where several annuitants distrained the tenants, these brought a bill of interpleader, and brought the rents into court; it was ordered by lord chancellor, that the tenants should be immediately paid their costs out of the rents, without waiting the event. 2 *Brown*, 149, 150.]

So, if *A.* receives money for *B.*, if upon an account between him and *C.* so much appears to be due to him, and if it is not due, to return it to *C.*, and both sue *A.*, he by bill of interpleader may bring

bring the money into court, and thereupon he shall have an injunction; and after an account between B. and C. he shall have costs from him who had no cause of suit. *R. Ch. R.* 257, 8.

[An executor cannot bring a bill of interpleader till he has proved the testator's will. *Mitchell v. Smart*, *H.* 1747, 3 *Atkyns*, 606.]

[To a bill of interpleader against attorney-general and others, there must be an affidavit annexed. *Errington v. Attorney-General et al.* *P.* 1731, *Bunb.* 303.]

[The affidavit to a bill of interpleader need not swear it is at plaintiff's own expence, only that there is no collusion with any of the defendants. *Metcalf v. Hervey*, *T.* 1749, 1 *Ves.* 248.]

[Interpleader must shew that there is such person *in rerum natura* as can interplead. *Ibid.*]

[But if a guardian sets up a title to himself, and conceals an infant who is suggested to have right to controvert that title, bill may be brought to compel the guardian to produce him. *Ibid.*]

[A parcel containing certificates of the *American* loan deposited by A. with bankers for safe custody. A. is afterwards arrested in suits against him, as partner in an insolvent house; and requests the bankers to deliver the parcel to him in prison, which they refuse to do. They are then served with attachments by the plaintiffs in those suits, and also held to bail in trover by A. They file a bill of interpleader against all the said parties, and held entitled to relief, tho' at law they would have been discharged on common bail, and bringing the deposit into court, and the proceedings in the action would have been stayed till the attachments were disposed of by the owner of the property in their names. *Langston v. Boylston*, 2 *Ves. jun.* 101.]

[A claim is a ground of interpleader. *Ibid.* 107.]

[In support of motion for injunction on interpleading bill, affidavits of the facts may be read: it does not rest on the answer alone. *Ibid.* 109.]

[Collusion not to be presumed against the plaintiff's affidavit; nor can a counter affidavit prevail. *Ibid.* 110.]

[Tenant cannot file a bill of interpleader against his landlord, on notice of ejectment by a stranger, under a title adverse to that of the landlord. *Dungey v. Angove*, 2 *Ves. jun.* 304. See also *Johnson v. Atkinson*, 3 *Anstr.* 798.]

[On suspicion of collusion, an enquiry into the circumstances was directed, and the report confirming the fraud; the bill was dismissed with costs to the landlord, as between attorney and client, to be paid by the plaintiff and his solicitor; the latter to shew cause why he should not be struck off the roll. *Ibid.*]

[Bill of interpleader is, where two persons claim of a third the same debt or the same duty. *Ibid.* 310.]

[An interpleading bill never suggests a case. *Ibid.* 311.]

[To support a bill of interpleader by a tenant, two persons must claim the same rent in privity of tenure, and of contract, as in the case of a mortgagor and mortgagee, trustee, and *cestuy que trust*, &c. *Ibid.* 312.]

[See also *Smith v. Target*, 2 *Anstr.* 529. and *Surrey v. Ld. Waltham*, *ibid.* 531. *in not.* In the former case the bill was dismissed with costs, being beneath the dignity of the court in point of value.]

[Where one claimant seeks a certain rent from the tenant in possession,

sion, and the other unliquidated damages for use and occupation, he cannot make them interplead. *Johnson v. Atkinson*, 3 *Anstr.* 798.]

(3 V) Joint-tenants.

(3 V 1.) Who shall join in a Suit.

IN a suit in equity, all who have a joint interest in the thing demanded ought to join.

But two persons cannot join in the same bill, to have relief in several respects.

So, the king and the queen dowager cannot join to have a recompence for a covenant broken by waste, &c. where the king has the inheritance, and the defendant claims under the lessee of the queen, who had a grant for her life. *R. Hard.* 219.

(3 V 2.) Who shall be joined.

All concerned in the thing demanded ought to be made parties in equity.

As, if a bill is against the executor of an obligor for the discovery of assets; all the obligors shall be parties, for the charge ought to be equal. 2 *Vent.* 348.

So, if one obligor is sued, all ought to be joined, tho' the others are only sureties. *Dub.* 2 *Vent.* 348.

But if there is judgment against one obligor, his executor may be sued for a discovery of assets without the other obligors; for the bond is extinguished by the judgment. 2 *Vent.* 348.

If B. has a joint demand against three joint factors, and two of them are beyond sea, he shall sue the other alone for the whole. 1 *Ver.* 140.

(3 V 3.) Who shall take jointly.

If an estate is limited in trust for others, they shall be joint-tenants of the trust, where they would take the estate jointly, if it was limited to them in the same manner. *Semb.* 1 *Ver.* 361, 2. *Vide Devise*, (No. 8.) *Estates*, (K 1.)

[If a settlement be to permit *all and every* the children to take rents and profits *to them and their heirs* for ever; they are joint-tenants. 2 *Brown*, 233.]

If articles are between many for their farming the excise: their interest survives in respect of the joint charge, without an express agreement to the contrary. *R.* 1 *Ver.* 33.

And if there is an agreement, that it shall survive, the benefit survives, tho' one assigns to his son. 1 *Ver.* 33, 4.

So, if there be a settlement upon trust, that his sisters divide the rents equally, and the whole shall be to the survivor; it will be a joint interest. *R.* 2 *Ver.* 323.

So, if a farm is demised to two. 1 *Ver.* 217. *Vide post.* (3 V 4.)

[Or, many by gift, devise, &c. take any estate or interest jointly. 1 *Ver.* 217.]

So, if there is a devise of the residue of the personal estate to A. and B., it will be a joint devise, and the survivor shall have the whole. *R.* 1 *Ver.* 482, 3. *Acc.* 1 *Ca. Ch.* 238.

So,

So, if the testator makes *A.* and *B.* his executors, their interest survives. 1 *Ver.* 483. 2 *Ca. Ch.* 65.

If 200 *l.* is devised for the purchase of land for *A.* and *B.*, and the purchase is made for the use of *A.* and *B.* jointly; the survivor shall have it. *R. Carth.* 15. *R. cont.* 1 *Ver.* 47.

But if a mortgage is made to two, there shall be no survivorship; but each shall have the money by him advanced with interest, and if he dies, his executor shall have it. *R.* 1 *Ch. R.* 58.

So, if 200 *l.* a-piece is devised to *A.* and *B.*, who take a mortgage for the whole to them jointly; the survivor shall not have it; for each is a trustee for the other for his share. *Carth.* 16.

[If joint-tenants of leasehold or freehold lay out money jointly upon it in the way of trade, there is no survivorship, 1 *Ves. jun.* 435.]

[An interest given to two or more, either by way of legacy, or otherwise, is joint, unless there are words of severance; as, "equally among," &c. on an inference of that sort arises in equity from the nature of the transaction; as, in partnerships, a joint mortgage, &c. *Morley v. Bird, at the Rolls*, 3 *Ves. jun.* 628.]

[Bequest to two, without words of severance: they take jointly. *Stuart v. Bruce*, 3 *Ves. jun.* 632.]

[Tho' the words, share and share alike in a will generally create a tenancy in common, they cannot have that operation, where there is an express joint-tenancy. *Armstrong v. Eldridge*, 3 *Bro. C. C.* 215.]

[Gift of a share over to the children of my late *W. U.* and *J. U.* share and share alike, at their respective ages of 21. This held to be a tenancy in common among those then living, and one of them dying in the lifetime of testator, that share is lapsed. *Martin v. Wilson*, 3 *Bro. C. C.* 324.]

[Executors divide a part of the testator's property, but lodge a sum in the funds to secure the payment of an annuity: as to this they are joint-tenants, and it shall survive on the death of the one to the other. *Balwyn v. Johnson*, 3 *Bro. C. C.* 455.]

[A legacy given to two or more persons, without words of severance, makes a joint-tenancy; therefore his honor determined that where, in a will, as to a residue, two thirds were given to and amongst the children of *A.* and *B.*, they took as tenants in common, but the remaining third being given to the children of *C.*, they took as joint-tenants. *Campbell v. Campbell*, 4 *Bro. C. C.* 15.]

(3 V 4.) Who, as Tenants in Common.

A gift of two, equally divided, makes them tenants in common. 2 *Vent.* 366. *Vide Devise*, (N 8.) *Vide Corp.* 660. *Vide Estates*, (K 8.)

[If a legacy be given to two, jointly and between them, they are not joint-tenants, and one dying, the legacy does not survive. 1 *Brown*, 118.]

[If *A.* devises the residue of her estate to *B.* and *C.*, daughters of *D.* and *E.*, whom she desires to be trustees for their children, and says, "And my will is, that my estate be equally divided between *B.* and *C.*, whom I appoint executors;" and leaves all the next of kin, except one, legacies; *B.* dies in testatrix's life; the devise is not a joint-tenancy, but in common; for the words to be equally divided, make

make a tenancy in common in a will, tho' not in a settlement. *Owen v. Owen*, H. 1738, 1 *Atkyns*, 494.]

So, *equally to be divided*. 2 *Vent.* 366. *P. W.* 15.

So, a devise to two *equally* makes them tenants in common. 2 *Vent.* 366. 1 *Ver.* 32.

So, a covenant to stand seised to the use of two, *equally to be divided*, and to their heirs and assigns, makes them tenants in common of the inheritance. *R.* 2 *Vent.* 365.

[If a father by deed, in consideration of natural love, grants after his death to two children the rents of lands, *equally to be divided* between them, they paying their mother 5 *l. per annum* during life, and after her death they to have the lands, to them and their heirs for ever, *equally to be divided* between them; it is a tenancy in common, and the deed a covenant to stand seised. *Rigden v. Vallier*, H. 1750, 2 *Ves.* 252.]

So, a trust to pay the profits to *A.* and *B.* in a ratable and equal manner, and afterwards to convey to them in like sort, shall be executed to them as tenants in common. *R.* 1 *Lew.* 232.

[If *A.* devises two houses to *B.* and *C.* generally, and then says, my meaning is, that the rents shall be *equally shared* between *B.* and *C.*, they shall take as tenants in common. *Prince v. Hylin*, H. 1737, 1 *Atkyns*, 493.]

A devise to *A.* and *B.*, paying 24 *l. per ann.* to *D.* for life, *viz.* each of them 12 *l. per ann.*; the payment by equal moieties makes them tenants in common. *R.* 1 *Ver.* 353.

If two pay *equally* for a purchase, they shall be tenants in common in equity. 1 *Ver.* 361. *Contra infra.*

[If five persons purchase overflowed lands as joint-tenants in fee, and they contribute jointly to the draining, and one deserts the undertaking, and the others buy several estates for carrying on their design, and several die, they shall be deemed tenants in common, and the heir of him who deserted shall be let in on paying his proportion and interest. *Lake v. Craddock*, M. 1732, 3 *P. W.* 158.]

[If two persons advance money on a mortgage, tho' it is made to them jointly, yet it shall be a tenancy in common. *Rigden v. Vallier*, H. 1741, 3 *Atkyns*, 731.]

[So, in a purchase, if there is a disproportion in the sums advanced, *otherwise, if the sums are equal*. *Ibid.*]

So, if it is said at the end of a will, that the executors shall take, *share and share alike*. 2 *Ca. Ch.* 65.

[A devise to children, *share and share alike*, makes them tenants in common; so does the word *respectively*. *Heathe v. Heathe*, H. 1740, 2 *Atkyns*, 121.]

[Therefore, if one of them dies intestate, after testator's death, his share goes to the father. *Ibid.*]

So, if a sum of money is devised to be laid out in a purchase for the benefit of *A.* and *B.* before a purchase made, the share of *B.*, if he dies, does not survive. *Carth.* 16.

So, where there are partners in trade or traffic, they shall take as tenants in common, and there shall be no survivorship; for the custom of merchants extends to all trades. 1 *Ver.* 217.

Tho' there is no clause that there shall be no survivorship. *Ibid.*

So,

So, if two persons join in the stock of a farm. *R. 1 Ver. 217. Vide ante, (3 V 3.)*

Tho' one of them said, that he was content that the stock should survive. *1 Ver. 217.*

So, in all cases where several join, or are interested jointly in the way of trade. *Ibid.*

So, if there is a devise to *A. and B.* in trust, that the profits shall be equally divided between the devisor's wife and daughter during the life of his wife, remainder over; the wife and the daughter are tenants in common, and if the daughter dies before the wife, her moiety in the nature of a tenancy *pur auter vie* shall go to her executor or administrator. *R. 2 Ver. 430. P. W. 34.*

If the surrender of a copyhold is, after the death of the surrendoror's wife, to the use of all his sons and daughters equally to be divided, and to their respective heirs; it is a tenancy in common. *Per two J. Holt. cont. P. W. 14. Sal. 391.*

[Legacy of 10,000 *l.* to two sisters to be equally divided, when they should arrive at twenty-one, is a tenancy in common, and one dying under twenty-one, her share shall go to her representative. *Jolliffe v. East, 3 Bro. C. C. 25.*]

(3 V 5.) What will make a Severance of the Jointure.

An act, which makes a severance of the jointure at law, will make a severance in equity. *Vide Estates, (K 5.)*

If three have the trust of a term, and one of them mortgages all his part, it will be a severance of all his interest in the term, and not only for the value of the mortgage; for joint-tenancy is not favoured in equity. *R. 1 Sal. 158.*

If *A. and B.* take jointly; a lease by one, to commence after his death, makes a severance, and will be good against the survivor. *R. 2 Ver. 323.*

[Equity will establish a parol agreement for orwely of partition of long standing, acknowledged by all to have been the actual agreement, and put in execution accordingly. *Ireland v. Rittle, M. 1739, 1 Atkyns, 541.*]

[There must be either an agreement or an actual alienation, to make a severance; the declaration of one party is not sufficient: thus if *A.* joint-tenant, on marriage settles her real estate, but as to the personal, there is only a recital that she shall enjoy it to her separate use, and a covenant from the husband for that purpose; and then those words, *for want of issue of her body*, to the next of kin of her family, and the other joint-tenant is not party hereto, it is no severance. *Partridge v. Powlet, T. 1740, 2 Atkyns, 54.*]

(3 V 6.) What Remedy one Joint-tenant, &c. shall have against his Companion.

[On a bill brought for a partition, plaintiff must shew a title in himself to a moiety, and not allege generally that he is in possession of a moiety; but he need not in his bill set forth a particular title, but a general seisin in fee. *Cartwright v. Pultney, T. 1742, 2 Atkyns. 380.*]

A joint-tenant or tenant in common, &c. shall have an account in equity,

equity, against his companion, for his share of the profits of an estate.
Vide ante, (2 A 1.)

So, one partner in trade against another. *Vide Eq. Abr.* 370, 1.

So, an executor or administrator of one partner. 1 *Ver.* 118.

So, if the other partner combines with the creditors, the court will appoint an attorney to recover the debts, if the defendant will not give security to answer the share of the plaintiff in them.
Ibid.

[But the court will not appoint a receiver of the stock and debts of a subsisting partnership trade, unless in cases of the grossest abuses of some of the partners. *Oliver v. Hamilton, Anstr.* 453.]

So, if there are joint-tenants of the trust of a term, and one of them dies, and his executor obtains an assignment of the term from the trustees; the other shall have a decree for an assignment to him; for equity will direct the trust to the survivor, as the term will survive, when there are joint-tenants of a term. *R.* 2 *Ver.* 556.

If *A.* and *B.* join in a purchase of lands, subjects to debts agreed to be discharged by the purchase-money; and for a favour to *A.* the creditors abate their interest, or compound for his sole benefit; *B.* shall have equal advantage of the abatement, for it was a mutual trust.
Eq. Abr. 7.

So, by *stat.* 3 & 4 *Ann.* 16. one joint-tenant or tenant in common, his executors or administrators, shall have account against the other, his executors or administrators, as bailiff, if he receive more than his share of the profits.

And tho' now by this statute an account lies at law, yet it seems more proper for equity, especially if there are mutual or various demands. *Eq. Abr.* 5.

So, one joint-tenant shall have contribution against his companion.

[Therefore, if money to fit out privateers is raised by shares, and some shares remain undisposed of, and a prize is taken, the undisposed shares belong to the managers, (whether they purchase them in after the capture or not,) and shall not be divided among the other owners; for in case of loss they would not have been liable for them. *Blunt v. Cumyns, T.* 1751, 2 *Ves.* 331.]

So, if a man makes a mortgage, and afterwards devises to *A.* for life, and afterwards to *B.* in fee; *B.* shall have contribution against *A.* for a proportion of the mortgage-money. *Ca. Ch.* 223, 4. 1 *Ver.* 70. *Vide post.* (4 A 6.)

So, if a testator charges lands with portions to his daughters, to be paid at such an age, and then devises *ut supra*; *B.* by bill shall compel *A.* to contribute his proportion, tho' the daughters are not arrived at the age when their portions are payable. *R. Ca. Ch.* 223.

(3 V 7.) When the Act of one binds his Companion.

If there are partners in trade, and one of them gives a note, and subscribes it, for himself and company; both are bound, tho' it does not appear that the other knew of it, or that the money was applied to the trade. 2 *Ver.* 278. 292.

(3 V 8.)

(3 V 8.) What not.

But if one joint-tenant devises his moiety to *A.*, it shall not be decreed against the survivor. 2 *Ver.* 385.

Or, makes a grant of his moiety to his wife, but such grant is defective, it shall not be aided. *Ibid.*

If *A.* and *B.* take a college lease, and agree that there shall be no benefit of survivorship, but afterwards renew without such an agreement made, and one of them assigns his moiety to his wife, by a defective deed; she shall not be aided under pretence of the antecedent agreement. *R.* 2 *Ver.* 385.

(3 V 9.) When an Act by one of them binds him after he survives.

If a joint-tenant devises all his land in *A.* and survives his companion, all passes which he took by survivorship; tho' his devise would have been void against his companion, if he had survived. *Eq. Abr.* 172.

(3 W) Judgment.

Chancery cannot proceed by suit in equity to annul a judgment at common law. *Arg.* 1 *Ch. R.* 47.

Nor, to stay judgment and execution being awarded by the court. 2 *Bul.* 194.

Nor, to examine the justice of a judgment given. *Semb.* 1 *Ch. R. E. of Oxford*, 7.

Nor, to imprison any person for not releasing his judgment. *Per Co.* 1 *Roll.* 111.

Nor, does it usually relieve after verdict, judgment, and a writ of error. *R. upon Demurrer*, 1 *Ch. R.* 248.

[But Chancery may order the party in whose favour judgment has been given in the court of law, to consent to a motion in that court, to have the judgment vacated: as, where judgment in error had been signed for want of an original writ, tho' there had before been a petition to the master of the rolls, and an order for one, but the order not signed and served. 2 *Brown*, 141.]

But after a judgment at law, a man may pray in equity to be relieved upon a collateral matter. *R. cont. upon Demurrer*, 4 *Inft.* 86. 2 *Cr.* 344. *Acc.* 1 *Ch. R. E. of Oxford*, 10. *Dub. Hard.* 121.

[The decrees of Chancery are of equal force with judgments at law; therefore if an executor is sued for just debts, and confesses the bill, and is decreed to pay them, and other creditors obtain judgments at law afterwards in real point of time, tho' the first day of term was prior to the decree, the executor shall, on bill exhibited for that purpose, be protected in obedience to the decree; the judgment creditors to be enjoined and come in after the decree creditors in due course of administration. *P. Jekyll*, M.R. affirmed by *Talbot C.* and affirmed by the House of Lords. *Morrice v. Bank of England*, M. 10 G. 2. C. T. T. 217.]

After judgment and execution. *Arg.* 1 *Ch. R.* 21.

In real as well as personal actions. *Ibid.*

After

After judgment in *B. R.* as well as in *C. B.* justices in *Eyre, &c.*
Arg. 1 Ch. R. 21.

After judgment upon a verdict, as well as upon a demurrer.
Ibid.

[If plaintiff at law knows the fact to be otherwise than the jury find it, and defendant was ignorant of it at the trial, this court will relieve, unless defendant submits to try it at law first, when he might have had discovery here by bill. *Williams v. Lee, T. 1745, 3 Atkyns, 223.*]

[This court will not relieve against excessive damages; for the remedy is, by moving the court where the action was tried for a new trial. *Ibid.*]

Tho' the equity alleged was a matter arising before the judgment given. *Arg. 1 Ch. R. 22.*

As, if the plaintiff obtains judgment upon a bond where the money is paid, but no acquittance given; or the acquittance is without a seal, or lost. *1 Ch. R. Earl of Oxford, 8. Cent. Hard. 23.*

So, if a man obtains a judgment at law for a thing discharged by the act of oblivion, *12 Car. 2. Chancery* will relieve; for a court of equity may interpret a statute, as well as the judges of the law. *R. Ca. Ch. 56. Dub. Hard. 121.*

[On the other hand, if judgment is taken against the lands, &c. of defendant, discharged by an insolvent act, who afterwards has a legacy left him, and plaintiff sues a *fiery facias* on his judgment, (the legacy being due but unpaid,) and in the executor's hands, and lodges it with the sheriff, and takes a warrant to levy debt and damages out of the legacy in executor's hands, and he refuses to pay, and plaintiff brings bill against the legacy in executor's hands, and he refuses to pay, and plaintiff brings bill against the legatee and the executor, the court will order debt, damages, and costs to be paid out of the legacy. *Edgell v. Haywood, T. 1746, 3 Atkyns, 352.*]

So, *Chancery* may make a decree, that the party release or discharge the judgment. *Arg. 1 Ch. R. 22. Vide 1 Rol. 111.*

[If a judgment is given for 6000*l.* to secure a purchase of the reversion of 300*l. per ann.* for 300*l.* only, the court will order it to stand as a security only for principal, interest and costs. *Barnardiston v. Lingwood, H. 1740, 2 Atkyns, 133.*]

[If a solicitor takes a judgment from his client for the costs, pending a cause, and there appear improper charges in his bill, the court will order the judgment to be delivered up, tho' the bill has been adjusted many years ago. *Drapers' Company v. Davis, P. 1742, 2 Atkyns, 295.*]

[Judgment at law, or an award, obtained by suppression of evidence, open to relief in equity. *2 Vef. jun. 135.*]

[If a decree has been obtained in the *Exchequer*, by consent that a will is well proved, which will is afterwards found by verdict to be forged, *Chancery* will restrain the party claiming under it from setting up that decree. *Barnsley v. Powell, T. 1749, 1 Vef. 284.*]

That he restore possession obtained upon the judgment. *Arg. 1 Ch. R. 22.*

That he release costs, account for mesne profits, &c. *Ibid.*

So, if *Chancery* by decree vacates a judgment at common law, yet it shall not be an offence within the *st. 27 Ed. 3. of Premunire*; for

the *Chancery* is not another court within the intent of that stat.; nor shall the cause be construed to be drawn *ad aliud examen*. *Cont. 3 Inst. 123. R. acc. 1 Lev. 242. Certified to the King by his Council, Arg. 1 Ch. R. 25. 27.*

[Before a final decree an executor may confess a judgment, which is not at all affected by a prior decree to account. *Smith v. Haykins Styles, T. 1742, 2 Atkyns, 385.*]

[A judgment having been obtained at law, tho' for an usurious debt, the creditor must stand as a judgment creditor for the money actually advanced, and legal interest. *2 Brown, 641.*]

(3 X) Jurisdiction.

When *Chancery* shall have it in Cases out of the Kingdom, &c.

SO, *Chancery* will give relief, tho' the land lies out of the jurisdiction, if the person is within the jurisdiction of the court; as, it will make joint-tenants account for profits of land in *Ireland*.

Or, a trustee who lives in *England* to perform his trust in *Ireland*, a county palatine, &c. *Vide post. (4 W 27.)*

So, it will decree the *Earl of Derby* to perform an agreement concerning the *Isle of Man*. *Ca. Ch. 221.*

[If a matter arises in the jurisdiction of the courts of *Wales*, of value or difficulty, parties may sue here; yet, if it is of small consequence, the court will dismiss the bill with costs. *Brace v. Taylor, H. 1741, 2 Atkyns, 253.*]

So, if land within the duchy is granted by the king, and upon a bill for a discovery and an account in *Chancery*, an injunction is granted by the duchy court; such injunction shall be over-ruled in *Chancery*, and the priority of suit being here, an injunction of the suit there shall be granted here. *1 Ch. R. 53.*

So, a plea shall not be allowed to a bill in *Chancery*, that the defendant has privilege to be sued in the *Exchequer*. *1 Ch. R. 69.*

For no privilege shall be allowed against a *subpœna* in *Chancery*, where the interest of the king is not concerned. *1 Ch. R. E. of Oxford, 14.*

Nor, a plea of privilege of the university to a bill concerning lands in *Cornwall*. *1 Ver. 212.*

But if it be allowed, it ought to come in by plea. *Ca. Ch. 237. R. 2 Vent. 362.*

So, *Chancery* shall have jurisdiction of a mortgage in a county palatine.

So, if the bill suggests that there are prior mortgages to persons out of the county palatine, tho' it be not proved. *Semb. 1 Ver. 298.*

So, a plea of the *Cinque Ports* was over-ruled. *1 Ch. R. 140.*

So, the court of *Stannaries* does not oust *Chancery* of its jurisdiction; for the former is a court of law, and not a court of equity. *2 Ver. 484.*

So, if *A.* mortgages the *Isle of Sark*, part of the duchy of *Normandy*, a bill lies in *Chancery* for the redemption. *R. 2 Ver. 495.*

So, *Chancery* will relieve against a decree in *Chester*, where the chancellor was a party. *R. 1 Rol. 331.*

So,

So, if an act of parliament gives an exclusive jurisdiction for such and such mines to a particular court; *Chancery* shall not be excluded, if the act does not erect a court of equity there. 1 *Ver.* 58, 9.

So, *Chancery* has an admiral jurisdiction in many cases. 1 *Ver.* 54.

[*Chancery* has jurisdiction on the subject of tithes in *London*, notwithstanding the statute and decree 37 *H. 8. c. 12.* and an account was decreed of the same. *Canons of St. Paul's v. Crickett*, 2 *Vesf. jun.* 563. *Miller v. Kynaston*, at the *Rolls*, *ibid.* 567. in not.]

A matter which ousts the court of jurisdiction, ought regularly to be alleged by plea, and shall not be objected at the hearing of the cause. 2 *Ver.* 484. [See *vide* 2 *Vesf. jun.* 563.]

But *Chancery* will not make partition of land in *Ireland*. 1 *Ver.* 421. *Vide post.* (4 E).

Nor, will it examine the *quantum* of a debt to the king, or the extents for it; for that belongs to the *Exchequer*, and a bill for it in *Chancery* shall be dismissed. 2 *Ver.* 426.

Except where the extent is a fraudulent contrivance, or the defendant admits that the debt to the king may be well satisfied without the extent. 2 *Ver.* 426.

Nor, will it grant a sequestration of lands in *Ireland*. *Eq. Ca.* 124.

So, if there is a decree for an account in the *Exchequer* of *Chester*, *Marches of Wales*, &c. *Chancery* will not relieve upon a bill here, because the witnesses live out of the jurisdiction. 2 *Ca. Ch.* 17. *R. Ch. R.* 452.

Nor, will it relieve against a decree of commissioners of sewers. 1 *Ver.* 59.

Nor, on a bill for an account of money collected by authority of commissioners of sewers; for the commissioners are a court, and have authority to determine. *R. Ca. Ch.* 232.

Nor, for discovery of the money collected. *R. upon Demurrer*, *Ca. Ch.* 232.

So, an appeal or bill of review does not lie in *Chancery*, on a decree in equity in a county palatine; but it ought to be to the king himself. *R. upon Demurrer*, 1 *Ver.* 177. 184.

So, a bill shall not be allowed in *Chancery* for discovery of the title to lands in the County Palatine of *Chester* or *Lancaster*. *R.* 1 *Ch. R.* 183. 278. *Vide post.* (4 E).

Nor, to obtain possession of lands there. 1 *Ch. R.* 278.

Or, an account of the profits. 1 *Ch. R.* 278.

Where the court has jurisdiction, it shall have regard to the laws of a foreign country, in its determination here; as, if a woman has a separate property in her money in *France*, it shall not be decreed to vest in her husband. *Semb. Eq. Ca.* 100.

If a debt is assigned in *Holland* by the husband to the wife, it shall be allowed here. *Ca. Ch.* 232.

[If a foreigner contrives a match with a ward of this court abroad, yet if he is afterwards found here, the court will punish him. *Roach v. Garvan*, *M.* 1748, 1 *Vesf.* 157.]

[This court can decree specific performance of articles executed in *England*, for settling the boundaries of two provinces in *America*. *Penn v. Ld. Baltimore*, *P.* 1750, 1 *Vesf.* 444]

[Tho' the jurisdiction of the court is submitted to by answering, yet if a want of it appears at the hearing, a court of equity will make no decree. 1 *Ves.* 444.]

[See *Nabob of the Carnatic v. East-India Company.* 1 *Ves. jun.* 371.]

Jury.

Vide Trial, ante (X).—*Post.* (4 V).

(3 Y) Legacy.

(3 Y 1.) When Words in a Will are expounded otherwise than they are in a Deed.

WORDS in a will may have a different construction from that which they have in a deed. *P. W.* 20. *Vide post.* (3 Y 7, &c.)

(3 Y 2.) A Devisee shall have the same Advantage as an Heir.

If a legacy out of land, for the portion of a son or daughter, lapses for the benefit of an heir, it shall also for the benefit of a devisee. 2 *P. W.* 276. *Vide ante*, (3 P 3, *Post.* (3 Y 7, &c.)

So, if it is devised for a portion, tho' not expressed for a portion. 2 *P. W.* 276.

So, if charged upon real and personal estate, as to the part which affects the real estate. 2 *P. W.* 278.

So, where the heir shall have the personal estate applied for the discharge of debts, a devisee shall also have it. 2 *P. W.* 277. *Pr. Ch.* 140. *Vide ante*, (3 A 4, &c.—3 P 1, 2.)

(3 Y 3.) How a Legacy shall be recovered in Equity.

Chancery will enforce the payment of a legacy. *Vide ante*, (3 A 1.—3 G 1.)

And if it is a legacy in equity only, and not at law, it ought to be demanded only in a court of equity, and not in the spiritual court; as, a sum to be paid upon a sale of lands. *R. Hbb.* 265.

If an infant sues for a legacy in the spiritual court, and afterwards in *Chancery*, a suit depending in the spiritual court is no plea for the defendant to the bill in equity; for the plaintiff there has not an equal advantage to get security or interest. *R. Ca. Ch.* 85. 1 *Ver.* 26.

If a legacy in a will is erased, but upon the probate the executrix admits the will to be proved, as if there was no rasure; equity will compel the payment. 1 *Ver.* 256. *P. W.* 388.

If the grandfather gives legacies to the grandson, which are received by the father, his executrix shall answer for all, not actually paid by the father, with interest, tho' the father had given a bond to pay 6000 L. to the grandson; for it shall not be intended to include the legacies, if they are not mentioned. 2 *Ver.* 481, 2.

[A legatee, whether expressly such or as *cestui que trust*, has a right to satisfaction on an administration bond against real assets, in the

the hands of devisee of administrator *de bonis non* of the original testator; and this tho' the nominal legatee and executor declared the trust, and covenanted to pay the legacy. *Ashley v. Bailee*, T. 1751, 2 Ves. 368.]

So, Chancery will oblige an executor to give security for the payment of legacy, payable at a future day, on a suggestion that he wastes the goods of the testator. *R. Ca. Ch.* 121.

And if the will is contested in the spiritual court, will stop him from receiving the debts, &c. till the contest is determined. *R. Ca. Ch.* 75.

If an executor pays a legacy pursuant to a will, without notice of a revocation of it, it shall be allowed him, tho' afterwards it appears that the will was revoked. *Ca. Ch.* 126.

(3 Y 4.) What shall be a Legacy.

A legacy imports a bequest made by a testator of his goods and chattels.

But it may be secured by a devise of lands, &c. *Vide ante*, (3 A 3, &c.)

Any words which shew the intent of the testator, are sufficient for a legacy. *Godol. p. 3. c. 22. sect. 21, &c. Vide Devise*, (N 1.)

As, if the testator desires his executor to give 200*l.* to B. without limiting a time for payment; it will be a good legacy. *1 Ch. R.* 246.

If a legacy is given by a will, and an annuity or a legacy of greater value to the same person by a codicil, it shall not be intended in satisfaction of the legacy by the will, but the legatee shall have both. *P. W.* 424.

[Where two legacies of *equal* sums are given to the same legatee, and in the same will, the legatee shall take only one. *1 Brown*, 30.]

[But where one of the legacies is in the will, and the other in the codicil, both shall pass. *Id.* 389, 390.]

[Where two legacies of the same sum are bequeathed to the same person by different instruments, *viz.* one in a will, and the other in a codicil, the legatee is entitled to both, unless there be some circumstance to shew that the intent of the testator was, that he should take but one. *James v. Simmuns*, C. P. M. 34 Geo. 3. 2 H. Bl. 213.]

[A *donatio causa mortis* is in the nature of a legacy, but need not be proved in the spiritual court as part of the will, for it operates as a declaration of trust upon the executor. *Miller v. Miller*, T. 1735, 3 P. W. 356.]

[It is not good unless made by the party in his last sickness. *Ibid.*]

[It is not absolutely necessary that it should be *in extremis*, a delivery with declarations of the intention at any time, if never revoked, seems good. 2 *Brown*, 612.]

[Nor, unless it is delivered in his lifetime. *Ibid.*]

[Nor, of a *chose in action*, the property whereof does not pass by delivery. *Ibid.*]

[The delivery of receipts for the consideration of *South-Sea* annuities is not sufficient delivery to support a *donatio causa mortis* of the annuities. *Ward v. Turner*, T. 1752, 2 Ves. 431.]

[There cannot be a *donatio causa mortis* of stock or annuities without a transfer, or something tantamount. 2 *Ves.* 431.]

[But a delivery of bank-notes sealed up in a paper, is a good *donatio mortis causa*. 2 *Brown*, 612. *Vide Ambler*, 318.]

[An absolute and immediate gift of a check on a banker payable to bearer, and of a promissory note, held not to be a *donatio mortis causa*, nor an appointment in the nature of it; and yet such gift could have no greater operation in equity than at law. Bill dismissed without prejudice to any action, court offering to retain the bill, if any accounts were to be taken of assets. *Tate v. Hilbert*, 2 *Ves. jun.* 111. 4 *Cro. C. C.* 286. S. C.]

[According to the true definition of a *donatio mortis causa*, it is in the nature of a legacy, is liable to debts, and is only a gift on survivorship. *Ibid.* 119.]

[It cannot be by parol. *Qu.* Whether it may be by deed or on writing? *Ibid.* 120.]

[Bill on a banker expressly for mourning is an appointment of the money for a purpose which necessarily supposes death; and therefore it requires no probate. *Ibid.* 121.]

[Issue directed to try whether there was a *donatio mortis causa*, because it did not appear to have been in the deceased's last illness. *Blount v. Burrow*, 1 *Ves. jun.* 546. 4 *Bro. C. C.* 72. S. C.]

(3 Y 5.) Of what Thing void.

But a void legacy shall not be decreed; as, if the husband of an orphan in *London* devises the money which belongs to his wife in the hands of the chamberlain of *London*; for this is a *chose in action* not devisable. *R.* 2 *Vent.* 341.

So, if a man devises a thing which by custom belongs to the heir at law, as an *heir-loom*; it will be void.

So, if he devises goods which he has only as executor or administrator, before a full administration made.

(3 Y 6.) How a Legacy shall be paid.

A legacy shall be paid, after all debts are discharged, out of the personal estate.

So, if land descends to the heir, and the personal estate is exhausted by the payment of debts upon bond, &c. to which the land was liable, the legatee shall have aid in equity against the real estate. *Semb. Sal.* 416.

So, if the personal estate is exhausted by the payment of a mortgage. *Sal.* 450. *Vide ante*, (3 P 3.)

[Where there are two executors residuary legatees, and on settling accounts one of them leaves in the hands of the other a sum sufficient to discharge the other legacies, and he in whose hands the money is left afterwards becomes bankrupt without having paid the legacies, the other shall answer out of his moiety of the residue, as far as it will go in discharge of them, tho' the legatees may have received interest of the bankrupt, and taken a dividend under the commission. *Ld. Raym.* 1320.]

[If a man devises his lands, (then in mortgage,) subject to his debts, to *B.* his wife for life, then to *C.*, the interest of his personal estate

to *B.* for life, then to *C.*, and gives *B.* 1500*l.* if she accepts his will in lieu of dower, and there is not personal estate to pay debts and legacies; if the mortgagee takes part of the personal estate, the legatees shall stand in his place for so much out of the real. *Lutkins v. Leigh*, *M.* 8 *G.* 2. *C. T. T.* 53.]

[If *A.* on marriage conveys a freehold, and also a term for years, to trustees, to raise a sum for his wife, and by his will gives a portion to his daughter; his son and heir, executor, shall not sell the term to pay his wife, but it shall go to pay debts and legacies, and the wife's be chargeable on the freehold. *Lucy v. Gardiner*, *M.* 1723, *Bunb.* 137.]

So, if the personal estate is devised to *A.*, and a term vested in trustees for payment of debts and legacies; the term shall be applied before the personal estate. *R.* 1 *Ch. R.* 47, 8.

[If lands are devised to pay debts, and simple contract creditors exhaust personal estate, a specific or pecuniary legatee shall be paid out of the land devised to pay debts. *Hastewood v. Pope*, *T.* 1734, 3 *P. W.* 322.]

[But if lands are devised to *A.* in fee, and specific legacy to *B.*, and bond-creditors come on specific legacy for payment, *B.* shall not stand in bond-creditor's place, to charge the land devised to *A.*; for he is a specific devisee as *B.* specific legatee. *Ibid.*]

[If *A.* purchases a term for 1000 years in lands, and agrees to give a consideration for the inheritance, and vendor covenants to procure conveyance to vendee and heirs; *A.* dies before conveyance made, leaving *B.* his daughter 3000*l.*, and *C.* his son executor and heir, who assigns the term in trust to attend the inheritance, and then takes conveyance of the inheritance to himself, then he confesses judgment to one, mortgages the inheritance to another, without taking notice or assigning the term, and dies insolvent; the judgment shall first be paid, then the mortgage, and then the 3000*l.* to *B.* the legatee, as *administratrix* to *C.* her brother, before the simple contract creditors. *Charlton v. Low*, *M.* 1734, 3 *P. W.* 328.]

[If a man gives his *South Sea* bonds in trust that his executrix pay several legacies, and gives all the residue of his estate to his wife his executrix, and the *South Sea* bonds are not sufficient, they shall be paid out of the other part of the personal estate. *Cooke v. Martyn*, *P.* 1737, 1 *Atkyns*, 2.]

If there are not assets for debts and legacies, the debts shall be paid before legacies to a charity. *P. W.* 264.

But if land is devised to the heir in tail, a legatee shall not have relief against the heir, tho' the personal estate is exhausted by payment of debts upon bond, &c. *R. Sal.* 416.

[If a man by will says, "as to my worldly estate, I dispose, &c. and gives 100*l.* to his daughter, to be paid by his son, his executor, a month after his widow's death, to whom he devises his real estate, with household goods, and stock in trade, for life, and then to his son;" and the personal estate is insufficient, the daughter's legacy shall be paid out of the real. *Lypet v. Carter*, *T.* 1750, 1 *Ves.* 499.]

[If *A.* leaves *B.* money, she leaving *C.* 500*l.* at her death, and *A.* dies; *C.* dies; *B.* dies; her representative cannot set off a demand of *B.* on *C.*, for the demand is *in autre droit*. *Medlicot v. Bowis*, *H.* 1748, 1 *Ves.* 207.]

[Where the use of goods is given to one for life, he must sign an inventory expressing them to be in his custody for life only, and then to be delivered and remain to him in remainder. *Slanning v. Style*, M. 1734, 3 P. W. 334.]

[The inventory is to be deposited with the master; formerly security was required. *Bill v. Kinafton*, 1740, 2 Atkyns, 82.]

[Legacy by a grandfather in trust for five children by name, and all and every the child and children of his son equally at 21, or on marriage of the daughters, with power to advance money for putting out all and every or any of the sons to business. The first attaining 21 held entitled to receive his share then. *Prescot v. Long*, 2 Ves. jun. 690.]

[Legacy payable at 21, before which time the legatee dies; a person claiming by limitation over takes immediately, but the administrator of the infant must wait till the time at which the legacy is payable, unless the whole interest is given. 3 Ves. jun. 15.]

[Legacy charged on land payable at a future day not vested till the time of payment. *Phipps v. Ld. Mulgrave*, 3 Ves. jun. 613.]

[Specific legacy of stock decreed according to the value at the time it ought to have been transferred. *Morley v. Bird*, 3 Ves. jun. 628.]

How a legacy shall be paid upon a devise to pay debts and legacies, *vide ante*, (3 A 3, &c.)

When a legatee shall refund, or abate in proportion, *vide ante*, (3 G 3.)—*post*. (3 Y 18, 19.)

(3 Y 7.) How a Devise shall be construed,

[Where legacies were given to six grandchildren by their christian names, but the name of one was omitted, and that of another repeated, it was held that all should take equally. 1 Brown, 31.]

[If a legacy be given to the two daughters of A., who has in fact three daughters, they shall all take. 2 Brown, 85.]

[But, to the children of A. shall not extend to a child *en ventre sa mere*. *Id.* 63.]

[A bequest to first and second cousins shall extend to a first cousin once removed, and to a great niece. *Id.* 125.]

[To the children of a deceased sister shall be only to the children living at the testator's death. *Id.* 658.]

[To grandchildren, shall extend to great-grandchildren, because in common parlance the first word includes the latter. *Ambler*, 603.]

The extent of the words. *Vide Devise*, (N 1, &c.)—*Vide ante*, (3 A 8.)

[If A. devises money to the relations of B. to be equally divided between them, it shall be confined to such as would take by the statute of distributions, but they shall take *per capita*. *Thomas v. Hole*, P. 1 G. 2. C. T. T. 251.]

[If A. devises to his *near relations*, it means such as are within the statute of distributions. *Whithorn v. Harris*, T. 1754, 2 Ves. 527. *Vide 1 Brown*, 31.]

[If a man devise a legacy to his *nearest* poor relations, it shall not extend to *all* his poor relations, even that he knew. *Goodinge v. Goodinge*, P. 1749, 1 Ves. 231.]

[If A. by will declares he intends to dispose of his household goods by

codicil,

codicil, and devises the residue of his personal estate not disposed of, or reserved to be disposed of, to his wife, and makes a codicil, without disposing of his household goods, they shall not go to the residuary legatee, but according to the statute of distributions. *Davers v. Dewes*, T. 1730, 3 P. W. 40.]

[If *A.* bequeaths to his grandchildren *B.*, *C.*, and *D.* 1000*l.* each, and the interest to their use, and if any dies, to the survivors or survivor, *share and share alike*, the interest to be paid to their father, to be improved to their use. *B.* dies an infant, then *C.* dies; the share which *C.* took by the death of *B.* shall not survive to *D.*, but go to the father, *C.*'s administrator, both principal and interest; for *share and share alike* are *tantamount* to *equally to be divided*. *Rudge v. Barker*, T. 9 G. 2. C. T. T. 124.]

[If a man gives all his estate, leases, and interest in his house in *H.*, and all the goods therein, and all plate, &c. to his wife, but desires her at her death to give such leases, house, goods, &c. amongst such of his relations as she shall think most deserving; and she by will gives her interest in the house to *A.*, and after legacies, the residue of her personal estate to whom she makes executors, and dies without giving the goods, &c. to her husband's relations, the wife took only beneficially during her life, and the goods, &c. or the value of them, shall be divided among the next of kin of the husband. *Harding v. Glyn*, T. 1739, 1 Atkyns, 469.]

[A devise of money to be divided among all the children of *A.* does not extend to a child born some years after the testator's death. *Heathe v. Heathe*, H. 1740, 2 Atkyns, 121.]

[If *A.* gives 3000*l.* to trustees to place at interest, or on a purchase, and to permit his wife to take the profits during life, and then to divide the whole principal and interest among his four children, *share and share alike*, and the survivors, but not before 21, or marriage; if any die before, his share to be divided among the survivors; and one of them, *B.*, attains 21, but dies in the mother's life; her representative shall have her share of what remains in money, but not of what is vested in real estates, which goes to the heir at law. *H.* 1740, 2 Atkyns, 123.]

[If a will directs that the interest with the principal of a testator's estate shall be settled on the daughter, or the heirs of her body, as the executors think fit; they cannot give it *from* her to them, but the word *or* must be construed *and*. *Read v. Snell*, T. 1743, 2 Atkyns, 642.]

[If the residue of real and personal estate is devised to trustees, to be settled on testator's daughter, and the heirs of her body, but in case she die *leaving* no heirs of her body, then as to one moiety to *A.* and his wife, and their heirs for ever, and as to the other, to *B.* and *C.*; this is a gift to the daughter for life, with a contingent remainder to such heir of her body as shall be living at the time of her death, and the devise over to *A.*, *B.*, and *C.* is good. *Ibid.*]

[If a man by will appoints the interest to be made of his personal estate shall be paid to his father for life, then to his mother for life, and after their decease gives the residue of his personal estate to his brother and sisters, and the sisters of his wife, *share and share alike*, and if either dies before him, or the survivor of father and mother, their share to be divided among the survivors of them; the brother dies

dies in testator's life, the sisters in the mother's life, the wife's sisters are entitled to the whole residue, to the accumulated shares of the persons dead, as well as to their own original shares. *Pain v. Benson*, P. 1744, 3 *Atkyns*, 78.]

[If a man by will bequeaths his lands to his wife *A.* for life, then to *B.*, niece to my said wife; *Item*, I give the use of 500 *l.* stock for her natural life, but after her death I give the 500 *l.* among the brothers and sisters of my said wife; the wife and not the niece shall have the 500 *l.* for her life. *Castledon v. Turner*, T. 1745, 3 *Atkyns*, 257.]

[If a man by will gives money to trustees to pay the interest to his children, with other directions, but makes no provision for the contingency of any of his children dying without any issue, but only that if the issue of any of the children should die without issue before 21, then their share to be divided among his children equally, and gives the residue of his estate to his sons, and one of his sons dies without issue, his share having never vested in him, shall not go to his representative; and being a share of a sum divided from what testator intended to be the residue, it shall not go to the residuary legatees, but shall go among the surviving children. *Fonereau v. Fonereau*, P. 1745, 3 *Atkyns*, 315.]

[If *A.* by her will gives to her nieces *B.* and *C.* each one half of the produce of bank-stock, and to their issue, and if either of them die before the legacy becomes due, and leave no issue, her share shall go to the survivor; and *B.* has a son at the time of the devise, and dies before *A.*, leaving a son, this son is entitled to a moiety of the produce of the stock; for the words relate to any issue she might leave at her death. *Lampley v. Blower*, M. 1746, 3 *Atkyns*, 396.]

[If a man devises 5000 *l.* out of his estate to be equally divided between his children, with remainder in the same estate to his first and other sons, and then to his daughters; the eldest son shall have a share. *Incedon v. Northcote*, H. 1746, 3 *Atkyns*, 430.]

[If a man devises lands to his wife for life, then to *A.* and the heirs of his body, and for want of such issue to be sold and divided among his relations, according to the statute of distributions; and *A.* dies without issue in the lifetime of the wife, she is not entitled to any share of the distribution. *Worsely v. Johnson*, M. 1753, 3 *Atkyns*, 758. *Davis v. Baily*, H. 1747, 1 *Vesf.* 84.]

[If a man by will gives 300 *l.* to the children of his sister *S.* to be paid by his executor, and equally divided at 21 or marriage, with interest, and failing any, their share to the survivors, and failing all to *G.* *S.* has but one child at making the will; it shall be construed for the benefit of all she shall have. *Maddison v. Andrew*, M. 1747, 1 *Vesf.* 57.]

[If a man devises his residue to be divided into fifths, two parts to *A.* and *B.* or their issue, in default to the survivor or their issue, one part to *C.* or his issue, one part to another brother whose name he has forgot, or his issue, another fifth to *D.* and her children; it shall be construed to such legatees, or their issue, whom he knew not whether they had children living or not; and to such legatees and their children jointly whom he knew to have children. *Le Farrant v. Spencer*, T. 1748, 1 *Vesf.* 97.]

[If *A.* devises 10 *l.* a-piece to the son and two daughters by name of

of *F. E.*, then 300 *l.* to *B.*, to be paid at 21 or marriage, and interest in the mean time for her maintenance; but if she dies before, then to the younger children of *F. E.*, equally to be divided, the eldest son to be excluded, and says nothing of interest; this shall go to such as are younger children at the death of *B.* *Ellison v. Airey*, *T.* 1748, 1 *Vesf.* 111.]

[If a woman having a power to appoint 4000 *l.* to her kin, and for default to go according to statute, and by will appoints to *A.* her nephew, he paying annuity to his mother, and gives the residue of her estate to her niece *B.*, and *A.* dies in testatrix's life, the 4000 *l.* goes to *B.* *Oke v. Heath*, *M.* 1748, 1 *Vesf.* 135.]

[If a man by will gives his daughter *A.*, wife of *B.*, 3000 *l.* for the use of her younger children, in such manner, share, and proportion as she pleases, and if no appointment, equally, and to survive if any die under age unmarried, it extends only to those born at making the will, or at most at testator's death. *Coleman v. Seymour*, *H.* 1748, 1 *Vesf.* 209.]

[If a legacy is given to younger children, and after testator's death a younger becomes the elder, he shall nevertheless have his share. *Ibid.*]

[If a man devises leasehold to his wife, for so many years as she shall live, then if son *R.* is living, to him for so many years as he shall live; but if then living, and shall then or afterwards have issue male then to him absolutely; but if *R.* die in wife's life, without leaving issue male, then over; and *R.* dies in wife's life; it goes to his representative. *Jackson v. Jackson*, *H.* 1748, 1 *Vesey*, 217.]

[If a man devises all his lands, &c. to his wife for life, then to his daughter for life, then to her children, equally to be divided, and for want of children to his right heirs on the side of the *F.*'s; the children take as tenants in common for their lives only, and each is entitled to a share of the profits from the death of the mother, tho' not born when the will made. *Goodwyn v. Goodwyn*, *H.* 1748, 1 *Vesf.* 226.]

[If a man by will gives a daughter 4000 *l.*, provided she releases when at age to her brother *A.* her share of an estate under her grandfather's will, and she receives part of it, *A.* is entitled to her share. *Ibid.*]

[If a man devise in trust for his son *A.* for life, remainder to support, &c. remainder to his first son, and the heirs of the body of such first son, and for default, to second, third, and fourth successively, in remainder, one after another; and *A.* has no son at making the will, has one who dies in testator's lifetime, and another, this last shall take as first son, and he might also take by the remainder to the second son. *Lomax v. Holmdon*, *T.* 1749, 1 *Vesf.* 290.]

[If a man gives 30,000 *l.* to his wife, and after other pecuniary legacies, the residue of his personal to his eldest son *R.*, except such legacies as he shall indorse as a codicil, and by such indorsement he directs that the 30,000 *l.* should be to his wife for life only, and then to be divided among his children as she should by deed, will, or instrument in nature of a will, direct; and she marries again, and in her second husband's life (having power to dispose) by will appoints the distribution of the money, and two of the children die in her lifetime,

lifetime, their shares go to the representatives of *R.*, the residuary legatee, and shall not be divided among the rest of the children. *D. of Marlborough v. E. Godolphin*, *M.* 1750, 2 *Ves.* 61.]

[If a man gives a sum to his son *W.*'s younger children, to be paid at 21, and if any dies, to survive to the others, it vests in those who are born at testator's death, and does not include those born afterwards. *Horsley v. Chaloner*, *M.* 1750, 2 *Ves.* 83.]

If a man devises *the moiety of his personal estate*, the moiety of money, bonds, and leases passes. *R. Ca. Ch.* 16.

[Devise of arrears of interest passes arrears of an annuity. *Hele v. Gilbert*, *T.* 1752, 2 *Ves.* 430.]

[A devise to trustees to pay the produce to *A.* without limiting the duration of the interest, is an absolute gift of the principal. 1 *Brown*, 532.]

If he devises his *worldly estate*, viz. *that debts be paid, and my wife have a moiety of what is left, and the remaining part of my estate, real and personal, I give to my brother.* *R.* that the wife shall have a moiety of the real and personal estate after debts paid. 2 *Ver.* 690.

[If a man by will devise all his lands in *W.* to his sister *A.* for life, with remainders over, then to her husband *B.* for life, then to *C.* for life, with remainders over, and makes *A.* and *B.* and another executors, and directs the surplus of his personal to be laid out in lands to be settled to the same uses; and by his codicil gives *C.* an annuity out of the freehold lands, limited to him till they come to be possessed by him, and reciting his will, directs that his dwelling-house, after the death of *A.*, should come to *B.*, *but the rest* of the lands thereby given to *B.* he directs the profits of them to be divided between *B.* and *C.*, and *C.*'s annuity to be taken as part of his dividend; *C.* is not entitled to the moiety of the interest of the surplus of the personal estate during the life of *B.* after the death of *A.* *Beauclerk v. Mead*, *P.* 1741, 2 *Atkyns*, 167.]

If a man devises *all his household goods*, his plate passes. 2 *Ver.* 638.

Or, *all his furniture and pictures.* *R.* 2 *Ver.* 512.

[If a legacy be given of a cabinet of curiosities, ornaments of the person, tho' frequently shewn along with it by the testator, shall not pass. 1 *Brown*, 467.]

If a man devises *all his personal estate* in *W.* to *A.* it will be a specific legacy, and will give all his goods, coaches, horses, and all that he had at that place. *R.* 2 *Ver.* 688. *Eq. R.* 87.

[If *A.* devises to his nephew and other trustees 6000 *l.* *South Sea* annuities, to be laid out on lands to be settled on *B.*, &c. and by codicil, taking notice of this, gives 1200 *l.* to the same uses, and makes his nephew executor, and dies possessed of large personal estate, but only 5360 *l.* *South Sea* annuities when he made the will; this is a specific legacy, and the 5360 *l.* shall not be made up 6000 *l.* out of the personal estate. *Ashton v. Ashton*, *M.* 9 *G.* 2. *C. T. T.* 152. 3 *P. W.* 384.]

[But if *A.* devises 1000 *l.* *South Sea* stock to his wife, he having then 1800 *l.*, afterwards reduces it 200 *l.*, then makes it up 1600 *l.*, then the act takes place, changing three fourths of the *South Sea* stock into annuities, and testator dies, having 400 *l.* stock and 1200 *l.* annuities,

nuities, the wife shall have the whole legacy of 1000 *l.* *Partridge v. Partridge*, M. 10 G. 2. C. T. T. 226.]

[If a man devises to A. 400 *l.* (without the word *my*) *East India* bonds, to pay the interest to B. till 21 or marriage, then to pay the said 400 *l.* *East India* bonds to her; and recites this bequest in codicil, and another of three exchequer orders, which he has since disposed of, and substitutes a pecuniary legacy for these orders, and only one *East India* bond is found at his death, it is not specific, but a bequest of quantity, and shall be made good from the residue. *Sleech v. Thorington*, T. 1754, 2 Ves. 360.]

[If a sum of *South Sea* annuity stock, or *South Sea* annuities is given to several persons in several proportions, and 13.13 the remainder thereof to A., and there is a deficiency, it is specific, and shall not be made good from the residue, but all the parties must abate in proportion. *Ibid*]

[If a man devise to his daughter 100 *l.* a-year long annuities, and then give to two others 50 *l.* long annuities each, these latter legacies shall be 50 *l.* a-year annuities. 1 *Brown*, 482.]

[But, if on the whole of the context the words of the testator be so uncertain as that it cannot appear from them whether he intended a certain sum by the year, or a gross sum, evidence of the state of his fortune shall be admitted to shew he meant only a gross sum; as, where a testator gave to M. P. the sum of 500 *l.* *stock in long annuities*, to M. H. the same, to J. L. B. the sum of 200 *l.* *stock in long annuities, the interest thereof to accumulate until she should attain 21*, and then the whole to be transferred to her by his executors, and also to H. D. 100 *l.* *stock and long annuities, the interest thereof to accumulate until she attains 21, and then the whole to be transferred to her by his executors*; and then gave the residue to his nephews: here because it appears uncertain whether the testator meant that the interest of a gross sum should accumulate, or that the legatees should have 500 *l.* *&c. per annum*, evidence was admitted to shew that the whole fortune of the testator was only 110 *l.* a-year long annuities. *Ibid*. 472.]

[If no fund be provided for legacies, they shall be in the currency of the country where they are given; as, where a will is made in *Ireland*, and some legacies are given in *sterling*, and others in *Irish* currency, and others without any denomination specified, these shall be in *Irish* currency. 2 *Brown*, 38.]

[If legacies be given in stock, and then others without that addition, and then others with a direction to sell stock, this makes them all stock legacies. 1 *Brown*, 28.]

If he devises 15 *l.* a-piece to each of his relations, on the part of his father and mother, payment of 15 *l.* to A. and 15 *l.* a-piece to each child of A. will be good; tho' it is not conformable to the distribution upon the statute for the distribution of intestates' estates. 2 *Ver*. 381.

So, a devise of his personal estate in W. to A., gives him the rents due at his death of the lands in W. *Eq. R.* 87.

Tho' it be all his personal estate, except his bedding; for that does not restrain the words to furniture. *Ibid*, 88.

[A devise of the rents and profits of an estate to a husband for life, without

without impeachment of waste, enables him to cut timber. *Partridge v. Pawlet*, H. 1737, 1 *Atkyns*, 467.]

If a man devises his bond, debt, &c. the money due passes.

And the interest, as well as the principal, due upon the bond.

If a man devises *all his household goods, money, and plate*; this gives all money due upon mortgage or security, but not his *South Sea* or annuity stock (being as a chattel real). *Per Gilbert Ch. B. Eq. Ca.* 203. *Dub. per me*, being coupled with the household goods, whether it extended beyond money in the house.

[A devise of 200*l.* secured on mortgage on the estate of *A.*, and all messuages, lands, and tenements for securing the same, passes the principal only. *Roberts v. Kuffin*, M. 1740, 2 *Atkyns*, 112.]

[If a father leave his daughter a money legacy, and then devises to her all goods and things of every kind and sort whatever, found in her closet at his death, this does not pass money found there. *Ibid.*]

[Goldsmiths' notes and bank-bills do not pass by a devise of mortgages, ground-rents, judgments, &c. whatever I have or shall have at my death, as plate, jewels, linen, household goods, coach and horses. *Timewell v. Perkins*, M. 1740, 2 *Atkyns*, 102.]

[Bank-notes will not pass by the word *securities*, but must be considered as cash; dividends paid into the bank where testator kept his cash are not dividends due and received by him. *Southcot v. Watson*, T. 1745, 3 *Atkyns*, 226.]

[If one seized of lands in *A.* and possessed of a term for years in *B.*, devises all his lands and real estate in *A.* and *B.* to *S.* and his heirs, and then disposes of his personal estate, this will not pass the term to *S.* *Davis v. Gibbs*, H. 1729, 3 *P. W.* 26.]

If he devises to his wife 1200*l.* and all the goods, chattels, plate, jewels, household stuff, and stock in and belonging to his house; 400*l.* in his house does not pass. *Pr. Ch.* 8.

[But by a devise of a man's house, with "all that shall be in it" at the time of his death, bank-notes and cash shall pass. *Ambler*, 68.]

[Current coin, if curious pieces, and kept with medals, will pass as such. *Bridgman v. Dove*, M. 1744, 3 *Atkyns*, 201.]

[A library of books, whether small or great, will not pass as furniture. *Ibid.*]

[If one devises to his wife all his household goods, and other goods, plate, and stock, within doors and without, and bequeaths the residue of his personal estate to *B.*, the testator's ready money and bonds do not go to the wife; for then the residuary bequest would be void. *Woolcomb v. Woolcomb*, P. 1731, 3 *P. W.* 112.]

If *A.* settles a house upon his daughter for life, and afterwards to others, and by his will devises *all the goods, furniture, and ornaments in the house, to such persons as the house was to go to after his death*; the daughter shall not have the property and disposal of the goods, but the use only for her life. *R. Pr. Ch.* 26.

If he devises to his wife *his rings and household goods*; plate used in the house doth not pass. *Pr. Ch.* 207.

[By a bequest of *household furniture* which should be within or upon the premises at the time of testator's death, plate which was very considerable, but was proved to be in use, and suitable to the rank of the

the testator, and pictures which were hung up, and linen were held to pass, but not books. *Ambler*, 605.]

[By a bequest of plate, &c. and stoves of all kinds, and other goods and chattels whatsoever, which should be in and about his dwelling house at T., running horses were held to pass. *Id.* 612.]

[If a woman says, I give to B. all my goods, wearing apparel of what nature and kind soever, except my gold watch; household goods, wearing apparel, and ornaments of the person only pass, but not the residue. *Critchton v. Symes*, T. 1743, 3 *Atkyns*, 61.]

If he says, *the furniture and pictures in my houses in A. and B. shall go with my houses, and my chapel plate to my chapel*; tho' furniture generally includes plate, yet plate carried for his use from one house to another does not go with his houses; for here it is distinguished from his furniture. *R. Pr. Ch.* 251. *Eq. Abr.* 200.

[China passes under the word *furniture*, unless the devise is by a shopkeeper. *Hele v. Gilbert*, T. 1752, 2 *Ves.* 430.]

If he devises to A. *his silver tea-kettle and lamp with the appurtenances*; the silver tea-pot, milk-pot, tongs, and canisters do not pass. *R.* 1728, *Eq. Abr.* 201.

So, if he devises *all his goods, chattels, furniture, household stuff, and other things which then were or should be in his house at his death*; 265 l. ready money, in the house at his death, does not pass; for *other things* import others of like nature. *R.* 1724, *Eq. Abr.* 201.

[If a man devises all his estate, real and personal, to trustees on trust, as to so much of his personal as should be on his seat at P. to suffer his wife to enjoy during life; a sum of money in the house does not pass, but all stock, live and dead, and all stores on the lands in hand, do pass. *Incedon v. Northcote*, H. 1746, 3 *Atkyns*, 430.]

If he devises so much money *to all the hospitals*; it extends only to all the hospitals in the town, &c. where he lives, if there are any there. *P. W.* 425.

[If a legacy be given to such lying-in-hospital as the executor shall name; and the testator afterwards strike out the name of the executor, the court will sustain the legacy, and appoint what lying-in-hospital shall take it. 1 *Brown*, 12.]

[So, of a legacy to repair parsonage houses, the selection of the objects is in the court. *Id.* 444.]

[If A. gives 100 l. to each of the *public* charities mentioned in the will of B., this includes charities not confirmed by charter, as to the poor of a parish, or poor housekeepers, at the discretion of an executor; the extensiveness makes it *public*. *Attorney-General v. Pearce*, M. 1740, 2 *Atkyns*, 87.]

But, if a man devises *all his moveable goods and chattels*, his debts do not pass. *R. Jon.* 225.

If he devises *all his furniture at his house at B.*, goods packed up to be sent and used for furniture there do not pass. *R.* 2 *Ver.* 739.

Nor, goods removed from the house by accident, by reason that the lease of the house was surrendered or expired, if done without fraud in the party. *R.* 2 *Ver.* 747.

[If captain of a man of war devises all his goods on board the ship A. and they are removed to ship B. before his death, yet they pass; tho' in case of a devise of goods in a house it is otherwise, unless

less they were removed on account of fire, and testator dies soon after. *Chapman v. Hart*, T. 1749, 1 Ves. 271.]

So, if a man agrees that his wife shall not have any of his personal estate, *except the household goods and furniture at his death*; and he has two houses, one in which he lives, and the other for the use of seamen; the wife shall have the former only. 2 P.W. 302. 304.

If an upholsterer devises *his household goods*, those in his shop do not pass. 2 P.W. 303.

[A devise by an *India* captain of all household furniture, linen, plate, and apparel whatsoever, includes only what is for domestic use, not what is for trade or merchandize. *Le Farrant v. Spencer*, T. 1748, 1 Ves. 97.]

So, if a man devises *his utensils*; plate and jewels do not pass. R. Dy. 59. b.

[A devise of household goods and implements of household does not pass malt, hops, beer, or victuals in the house, nor guns and pistols used in riding or shooting game; but a clock in the house not fixed to it passes. *Slanning v. Style*, M. 1734, 3 P.W. 334.]

[If a man possessed of a lease of a farm, *malthouse*, &c. at 40 l. per ann. gives to his wife all his household goods, cattle, corn, hay, and implements of husbandry and stock belonging to his house, messuage, farm, and premises in said lease, and she to pay the 40 l. rent; the stock in the malt trade passes. *Brooksbank v. Wentworth*, T. 1743, 3 Atkyns, 64.]

If by will he acquits his servant of *all debts, accounts, and demands*; a trunk, in which there are jewels, &c. in the custody of the same servant, is not thereby devised to him. *Semb.* 2 Ver. 114.

If he devises to his wife *all his jewels*; his collar of SS. and garter, or diamonds fastened to bonnet or robes, do not pass. R. Owen, 124.

If he devises *all his household goods*; plate commonly used in the family passes. P.W. 425.

[By a bequest of all drawings and pictures, pictures bought after making the will pass. *Ambler*, 641.]

[If a man by will devises all his *plate* to his wife, and by his codicil gives her the use of his *household goods* for life only; if it appears the plate was used in his house, the words household goods include the plate, and she shall have it for life only. *Snelfson v. Corbet*, T. 1746, 3 Atkyns, 369.]

So, if A. devises 200 l. to each of his three daughters, and if any die without issue, her part to go to the survivors; if any marries and dies without issue, her part does not survive; for money cannot be entailed. R. 2 Vent. 349.

[Limitation of personal property after a disposition, which would raise an entail express or implied in a real estate, is void; and the person who would be tenant in tail takes the absolute interest. *Chandlefs v. Price*, 3 Ves. jun. 99.]

[Testator gave the interest and produce of the residue to his two sisters for their lives, and after their decease the principal to be paid to their children, share and share alike; but whichever died before the other, then the share so paid to her to be paid to her children in equal proportions: but if she should leave no children, then the interest

interest and produce to be paid to the survivor as aforesaid. One sister died without leaving children; the survivor held entitled to the interest for life, and that the principal was vested in all her children. *Taylor v. Langford, at the Rolls, 3 Ves. jun. 119.*

[Testator directed that his wife should have liberty to occupy his house for a year, provided she continued so long in *L.*; then by a distinct clause, he directed his executors to pay her a guinea a-week during her stay at *L.*; her residence there beyond the year held not to entitle her to a continuation of the weekly payment. *Walker v. Watts, 3 Ves. jun. 132.*

[Money settled in trust to be paid according to the appointment of *A.*, and in default thereof to his legal representatives, according to the course of administration; *A.* by will, in pursuance of the power, appointed to his legal representatives according to the course of administration, and made a residuary legatee, whom he appointed one of his executors; on the will the next of kin held to be entitled. *Jennings v. Gallimore, at the Rolls, 3 Ves. jun. 145.*

[Annuity by will charged on a real estate for *A.* for life, payable to him only on his own receipt, and no other, and to cease immediately on alienation, held to cease by the bankruptcy and bargain and sale of the estate of *A.* *Dommett v. Bedford, at the Rolls, 3 Ves. jun. 149.*

[Testator gave his sister *M.* and his brother *W.* the interest of the residue equally: at the death of *M.* one half of the principal to her children, her husband by no means to have any part, but to be entirely for the children; if none, to *W.*'s children, and after the death of *W.* and his wife, the other half to his children; and he excluded his eldest brother from any benefit; *M.*'s life interest held not to be to her separate use; that the interest of the other moiety, during the lives of *W.* and his wife, would have vested in *W.*, and therefore lapsed by his death in the life of the testator. *Brown v. Clark, at the Rolls, 3 Ves. jun. 166.*

[Legacy to *A.* for life, and after her decease to her children; if she should leave none, to *B.* and *C.* share and share alike, or to the survivor; the interest held to be vested in *B.* and *C.* on the death of the testator as tenants in common, *A.*, tho' she survived them, dying without children. *Perry v. Woods, 3 Ves. jun. 204.*

[Testator gave all his waggon-ways, rails, staiths, and all implements, utensils, and things, at his death, used or employed together with or in or for the working, management, or employment of his collieries, and which might be deemed as of the nature of personal estate, in trust to be held, used, or enjoyed, with the collieries: under this bequest, and upon the circumstances, money due from the fitters and others, and in the *Tyne* bank, coals at the pits and staiths, corn, hay, horses, timber, oil, candles, fire engines, and various other articles of the stock in trade, were held to pass. *Stuart v. Earl of Bute, 3 Ves. jun. 212.*

["I return *A.* his bond," in a will, is not a release, but a legacy; and having lapsed, the bond was held to remain in force against a surviving co-obligor. *Maitland v. Adair, 3 Ves. jun. 231.*

[Residue bequeathed to relations in the proportion the testator had given the other part of his fortune: pecuniary legatees only are entitled, not a devisee of real estate. *Ibid.*

[Bequest to relations does not include those by marriage. 3 *Ves. jun.* 231.]

[Bequest to the youngest child of *A.*, if she should have any child or children within a certain period; if no child or children within that period, over: her eldest child, being the only one within the period described, held entitled. *Emery v. England*, 3 *Ves. jun.* 232.]

[On a legacy to the issue of *A.*, all descendants are entitled, and take *per capita* as joint-tenants. *Davenport v. Hambury*, at the Rolls, 3 *Ves. jun.* 257.]

[Testator gave 1000*l.* stock to a married woman for her separate use, and whenever she should die, to be absolutely in her own power to dispose of by will, or writing purporting to be her will, to any person or persons, purpose or purposes, she should think proper: but in case of failure of any such disposition or appointment, to go over: this held not to be a power, but an absolute gift, qualified only to exclude the husband upon the death of his wife, therefore that it passed by general words in her will. *Hales v. Margerum*, at the Rolls, 3 *Ves. jun.* 299.]

[Legacy of stock to *A.* to be laid out in an annuity for her life; *A.* died two days after the testator, and before any alteration of the stock; her administrator held entitled to a transfer. *Barnes v. Rowley*, 3 *Ves. jun.* 305.]

[Under a bequest of the use of a house, with all the furniture and stock of carriages and horses, and other live and dead stock, for life; plate passed, wine and books did not. *Porter v. Tournay*, at the Rolls, 3 *Ves. jun.* 311.]

[A legacy, on an express contingency, which never happened, held to fail, notwithstanding the apparent intention in favour of the legatee. *Holmes v. Cradock*, at the Rolls, 3 *Ves. jun.* 317.]

[Settlement of the wife's estate to such uses as the husband and wife, or the survivor, should appoint by deed or will, with three witnesses, in default thereof, to the heirs of the husband; the wife surviving made a disposition by her will to a charity, and therefore void; decreed to the heir of the husband. *Attorney-General v. Ward*, 3 *Ves. jun.* 327.]

[The construction of the will being, that the real estate was well charged in aid of the personal with legacies, even supposing the charge not general, so as to include future legacies; a legacy may be revoked, and given to another person by an unattested codicil. *Ibid.*]

[Testatrix gave by codicil to *A.* the legacy given by her will to the children of *B.*, "as I know not whether any of them are alive, and if they are well provided for;" tho' they are living, *B.* held to be entitled. *Ibid.*]

[Testator gave 100*l.* in trust to pay the interest to *A.* till her daughter *B.* shall attain 24, and then he gave the said 100*l.* and the interest then due to her said mother *A.*; this legacy decreed to the daughter at the age of 24. *Clarke v. Norris*, 3 *Ves. jun.* 362.]

[Testatrix gave to *A.* the dividends of 500*l.* stock, till he should attain the age of 32, at which time she directed her executors to transfer the principal to him; the legacy held not to vest till the age of 32. *Butsford v. Kebble*, 3 *Ves. jun.* 363.]

[Legacy

[Legacy in trust for testator's mother and sister for life, and after the death of the survivor for all and every the child and children of his sister living at her death, share and share alike, each receiving his or her share of the principal at 21; and if but one child should be so surviving, in trust to pay the whole to such surviving child at 21; the payment only held to be postponed, not the vesting. *Wadley v. North, at the Rolls, 3 Ves. jun. 364.*]

[Testator in India gives all his estate and effects to A. in England in trust, and directs his property to be remitted to him; and after several legacies he gives A. 800*l.*, and requests him as soon as the property is remitted, to lay out the same in the funds, or other securities, which shall appear most advantageous for those who shall be benefited by it hereafter; the 800*l.* held to be a beneficial legacy, not in trust. *Ibid*]

[Grandchildren entitled under a bequest to issue. *Freeman v. Parsley, 3 Ves. jun. 421.*]

[Testator directed his children generally to be maintained during the life of his wife, but distributed his property after her death in words, which would not comprise after-born sons; they were held entitled to the former provision. *Matchwick v. Cock, at the Rolls, 3 Ves. jun. 609.*]

[Bequest of personal estate after a contingent limitation in tail, which did not take effect, established. *Phipps v. Lord Mulgrave, 3 Ves. jun. 613.*]

[Trust by will for all the children of A. when and as they shall severally attain sixteen, with a direction for maintenance; those born after the eldest attained sixteen were held excluded; maintenance was directed without regard to the father's ability. *Hofse v. Pratt, 3 Ves. jun. 730.*]

[Bequest to "the society for increasing clergymen's livings in England and Wales, for the perpetual purpose of increasing their livings;" the governors of Queen Anne's bounty alone answer the description, and as all their funds are laid out in land, the bequest was held void by the stat. of mortmain. *Middleton v. Clitherow, 3 Ves. jun. 734.*]

[Legacy to A. if he be living, and in case of his death before the decease of B., to C., held to be contingent; that is, if A. survive B. *Hodges v. Peacock, at the Rolls, 3 Ves. jun. 735.*]

[If A. gives three fourths of his personal estate to his three sons, equally to be divided, and devises the other fourth to his sons in trust for his two daughters, the interest to be paid to them respectively during their lives, and afterwards to their or either of their child or children, and for default, to his three sons, equally to be divided; and one of the daughters dies, leaving a son, the other without issue, her moiety shall go to the son of the other. *Stephens v. Hide, P. 7 G. 2. C. T. T. 27.*]

[If a man devises 10*l.* to each servant living with him at his death; it does not extend to the steward of a court, or such a one who serves many others besides the testator. *R. 2 Ver. 546.*]

[If a man gives 100*l.* to the two servants living with him at the time of his death, and has only two at making the will, but takes a third, and all three live with him at his death, the 100*l.* shall be

be divided among them all. *Sleech v. Thorington*, T. 1754, 2 *Ves.* 560.]

If he devises so much sugar to be paid at such a time; if it is not paid at the time, the executor shall be decreed to pay the value with interest. R. 2 *Ver.* 553.

If he devises land and money to his wife; provided, if she dies without issue, 80*l.* shall go to his brother, after the death of his wife; if she has no issue at her death, the 80*l.* shall go to his brother, for it shall be intended to be immediately upon her death. R. 2 *Ver.* 758, 766.

[If A. by codicil gives to B. during her natural life his house, with all the goods therein, the devisee has no larger interest in the goods than in the house. *Leeke v. Bennet*, H. 1737, 1 *Atkyns*, 470.]

[If a man covenants to lay out a sum in lands, and devises his real estate before such purchase made, the money agreed to be laid out will pass to the devisee. *Green v. Smith*, M. 1738, 1 *Atkyns*, 572.]

[If a man, having made his will, enters into a contract for purchase of land, the lands contracted for will not pass by the will, but descend. *Ibid.*]

[If an ancestor after making his will agrees for the purchase of particular lands, the heir at law shall have them if good title can be made, otherwise not, nor shall he in that case have the money. *Ibid.*]

[The word *estate* passes not only land, but all the interest the testator has in it, tho' there is a locality. *Tuffnal v. Page*, P. 1740, 2 *Atkyns*, 37.]

[If A. devises lands to trustees to receive the rents, and pay them to his wife for life, and to permit her to charge them with 200*l.* then to B. for life, then to C. for life, charged and chargeable as aforesaid, and after determination of these estates, to D. his heirs, &c. charged and chargeable with 1000*l.* a-piece to his six nieces, to be paid to them respectively in twelve months after his death, and to be raised by the trustees in like manner: the words *charged* and *chargeable* run over the particular estates as well as the fee, and the legacies shall be paid twelve months after the death of A. *Carter v. Carter*, M. 1748, 1 *Ves.* 168.]

If he devises his personal estate and the produce of it to his son, and if he dies before 21 or marriage, to his brother: if the son dies before 21, the brother shall have only the capital, not the produce in the lifetime of the son. R. 1 *P. W.* 503.

[If personal estate is devised to A., the produce of it (after maintenance) to be laid up till he is 21; and if he dies before 21, and his mother has no children, then all the legacies and bequests to A. to go to B.: A. dies before 21; the produce from the death of A. shall accumulate and be added to the capital, and if the mother dies without children, goes to B. *Studholme v. Hodgson*, T. 1734, 3 *P. W.* 390. *Green v. Ekins*, M. 1742, 2 *Atkyns*, 473.]

[If a mother gives all her real and personal estate to her daughter and her heirs; but if she die before she is of age to dispose thereof, then gives the same to trustees to raise 6000*l.* for a charity, the residue thereof, if her daughter dies unmarried, to her (testatrix's) sisters; and

and the daughter marries, has a daughter, and dies aged 20; her husband shall have the personal estate, as she was of age to dispose of that at 14; the real estate shall satisfy the 6000*l.* and subject thereto go to the husband for life as tenant by curtesy, and then to his daughter in fee. *Bellasis v. Uthwatt, H. 1737, 1 Atkyns, 426.*]

[If one devises lands to trustees to be sold, and the money to be laid out in lands or stock, in trust to permit *A.* to receive the profits during life, then in trust to *B.* during life, then in trust for the use of the issue of the body of *B.* with remainders over, the money must be laid out in land, *B.* has only an estate for life, issue takes in male and female, and there must be cross-remainders to the females. *Meure v. Meure, P. 1737, 2 Atkyns, 265.*]

[If a man by will creates a term in trust by the rents and profits, or by mortgage, to raise portions for the daughters of his son *A.* payable at 18 or marriage, with a maintenance in the mean time, with a power to *A.* to make a jointure of all the premises, the portions cannot be raised so as to affect the jointress, but shall be raised by mortgage of the reversion, with interest from the time they were payable. *Hall v. Carter, T. 1742, 2 Atkyns, 354.*]

[If a man gives all his real and personal estate to *A.* and *B.* equally between them for life, and on the death of *A.* the whole estate to *B.* in tail general, and for want of such issue to *C.* in fee, and gives pecuniary legacies chargeable on the real, if the personal not sufficient; and then gives all the residue of his personal estate to *D.*; *D.* shall have it and not *B.* *Ulrich v. Litchfield, T. 1742, 2 Atkyns, 372.*]

[If money is devised to trustees, to be laid out in the purchase of an annuity clear for *A.*, it means an annuity free from taxes. *Hodgeworth v. Crawley, T. 1742, 2 Atkyns, 376.*]

[If a man makes his will in *Jamaica*, and gives several legacies to be paid in *sterling* money, then two legacies generally without mentioning *sterling*, then devises real estate and specific legacies, then other legacies in *sterling*, and dies, leaving effects in *England* and in *Jamaica*, the two legacies must be paid in *Jamaica* currency only, tho' one of the legatees lives in *England.* *Saunders v. Drake, M. 1742, 2 Atkyns, 465.*]

[As long as the fund exists upon which a legacy is charged, tho' it devolves to the heir or executor, yet they shall take it subject to the charge; therefore if *A.* says that what his personal falls short of paying legacies he charges on his lands, and then gives to *B.* the household goods in the schedule annexed, he paying certain annuities, and annexes no schedule, the household goods in the executor's hands shall be first applied, then the personal, and then the lands. *Hills v. Wirley, T. 1743, 2 Atkyns, 605.*]

[Legacies of the same specific thing, in different codicils, are only repetitions; so of the same sum of money, or quantity of things; legacies in the last codicil greater than in the first are not additional several legacies, but augmentations of the first, and if smaller, diminutions of the first. *D. of St. Albans v. Beaucherk, P. and T. 1743, 2 Atkyns, 636.*]

[If a mother by will gives her daughter 30*l.* per annum whilst unmarried, by 15*l.* at *May-Day*, and 15*l.* at *All-Saints*, and she marries

before the half-year's payment becomes due, she shall be paid *pro rata* till the time of the marriage. *Reynish v. Martin*, P. 1746, 3 *Atkyns*, 330.]

[If a man devises all his plate, books, pictures, and household goods to such male (when 21) as shall then be entitled to the trust in possession of his real estate, and till then the said plate, &c. should be kept at *D.* and used by such male residing there, declaring his will to be that said plate, &c. may go as heir-looms with his estate as long as the law will permit; they shall go as heir-looms, for the devise is only a disposition of the use till the person entitled to the inheritance attains 21. *Trafford v. Trafford*, T. 1746, 3 *Atkyns*, 347.]

[If a man by will, reciting that he has settled his estate on *A.* for life, to his first and other sons in tail male, and then to be sold, and the money divided between four persons, then directs that his household-stuff at *H.* should remain and continue there for the use of such person or persons as shall enjoy the estate by the settlement, to be delivered to him or them by his executor, when the person is capable of giving a discharge, and in the mean time his executor to take care of them; they shall not be sold as heir-looms with the house, but go to the representative of *A.* the first taker. *Wyth v. Blackmen*, H. 1748, 1 *Ves.* 196.]

[If books are devised to tenant in tail, they are not heir-looms, but his property as first taker. *D. Bridgewater v. Egerton*, H. 1750, 2 *Ves.* 121.]

[If a man devises a house and appurtenances to his wife during widowhood, but that his son when 21 or married, might have it, paying, &c. and she marries, and he is not 21, when 21 he may have it; the intervening interest is undisposed of, and goes to the respective residues real and personal. *Ibid.*]

[If a husband who is bound to leave his wife 500*l.* by will, and having no *India* stock; but his wife being entitled to 700*l.* bank stock *en autre droit*, which she afterwards transfers to him, and it stands in his own name, if he leaves his wife 700*l.* *India* stock, the 700*l.* bank shall pass by it. *Doer v. Geary*, T. 1749, 1 *Ves.* 255, 1 *Wilf.* 247.]

[If a man by will gives an annuity in fee, a jointure and other legacies, and subject thereto 200*l.* *per ann.* to his daughter till of age, or married, and then directs his executors to entail on his daughter all his estate and effects; it is subject to the annuities, but the profits accumulated shall not be settled, but belong to the daughter. *E. Stafford v. Bulkeley*, H. 1750, 2 *Ves.* 170.]

[If the residue of personal estate is given to *A.* if he attains 21, the profits shall accumulate till then. *Trevanion v. Vivian*, T. 1752, 2 *Ves.* 430.]

[If a man devises the residue of his personal estate to his executors who receive some part, and divide it among themselves, and then one dies, the survivors shall have all the surplus not already divided. *Willing v. Baine*, T. 1731, 3 *P. W.* 113.]

[A devise to a wife of household goods, plate, jewels, linen, &c. for life, entitles her to use them any where, or to let them out to hire. *Marshal v. Blew*, M. 1741, 2 *Atkyns*, 217.]

[If a man by will gives and bequeaths to his wife all his household goods,

goods, &c. in or belonging to his house, and also the said house, gardens, and land thereto belonging, so long as she continues his widow, and no longer; and also gives her his jewels, coach, &c.; the household goods, &c. are under the same restrictions as the house, but the jewels, coach, &c. are her absolute property. *Richards v. Baker*, T. 1742, 2 *Atkyns*, 321.]

[A devise being to trustees of freehold and leasehold, out of rents and profits, &c. to pay debts and legacies, and subject thereto, in trust for the testator's nephew, at 21, with directions to maintain him out of the rents and profits during his minority; it was held that the surplus rents were applicable to payment of the principal debts and legacies. *Amblar*, 68.]

[But if there be a residuary legatee such rents and profits shall go to him; as, where a real and personal estate was devised to trustees to pay annuities and legacies, the residue of the estates to the child or children of F. C. with remainders over; it was held that the intermediate profits till a child was born, should go to the residuary legatee. *Id.* 93.]

[If a legacy be given of a specific sum, as a residue, but miscalculated, the residue shall pass, tho' more than the sum calculated. 2 *Brown*, 18.]

So, if a debt be given, but the sum mistaken, the actual debt shall pass. *Id.* 87.

[Testatrix gave stock to trustees on trust to pay the dividends to her niece for life; and after her decease, that it should be equally divided among the brother and four sisters of the testatrix, and in like manner among the survivors, or survivor of them: and she made the niece residuary legatee. This is a tenancy in common between those alive at the death of the niece and the representatives of such as died in her lifetime after the testatrix. *Roebuck v. Dean*, 2 *Vesf. jun.* 265. 4 *Bro. C. C.* 403. S. C.]

[Testator gave the residue of his personal estate to his executors for their own use; afterwards by a codicil, he directed them to dispose of it in charities; tho' the latter bequest were void, held by M. R. that the executors were trustees of such residue, and could not claim for themselves. *Pickering v. Lord Stamford*, 2 *Vesf. jun.* 279. 4 *Bro. C. C.* 214. S. C.]

[This clause at the commencement of a will, "first, I will and direct, that all my legal debts, legacies, and funeral expences shall be fully paid," held by M. R. not sufficient alone to charge legacies on real estates specifically devised, as it is to charge debts. *Rightley v. Rightley*, 2 *Vesf. jun.* 328. *Sed vide Williams v. Chitty*, 3 *Vesf. jun.* 551.]

[Testatrix mortgagee of an estate of which her brother was tenant for life, and having his bond for some arrears of interest, bequeathed to him the arrears of her mortgage on his estate and likewise the bond; the principal mortgage money does not pass. *Hamilton v. Lloyd*, 2 *Vesf. jun.* 416.]

[A legacy substituted for another shall be raised out of the same fund, and subject to the same conditions. 2 *Vesf. jun.* 450.]

[Bequest of residue to the use and behoof of A, and in case of her decease, to the use and behoof of her children, share and share alike; by a codicil testatrix gives a ring, part of the residue, to A;

held that *A.* took a life-interest only in the residue, the capital to her children after her decease. *Lady Douglas v. Chalmer*, 2 *Ves. jun.* 501.]

[Three annuities for a term of years bequeathed in trust for three children, *A.*, *B.*, and *C.* respectively for life; in case of the death of either, leaving any child or children, his or her annuity to be equally divided between such child or children share and share alike; in case of the death of either without issue, his or her annuity to go to the survivors or survivor of them equally share and share alike, with a limitation over in case of the deaths of all without issue as aforesaid: *A.* died without issue; *A.*'s annuity went to *B.*, and *C.*, subject to the contingent limitation over; and upon *B.*'s death, leaving children vested absolutely in them, and now belongs in moieties to his administrator and to *C.* *Vandergucht v. Blake*, 2 *Ves. jun.* 534.]

[*A.* bequeathed to his wife the dividends of 4000*l.* bank-stock for life, and on her decease, to be transferred, and the produce thereof, 500*l.* he gave to the plaintiff, the other to be divided among the defendants: the plaintiff held to be entitled only to 500*l.* not to 500*l.* stock. *Longdale v. Sir Thomas Crawley Bowey*, 2 *Austr.* 570.]

[Bequest of "all other unbequeathed goods and chattels" is residuary, notwithstanding a subsequent bequest to the same person of debts due to the testator. *Bennet v. Batchelor*, 1 *Ves. jun.* 63. 3 *Bro. Ch. Ca.* 28. *S. C.*]

[No difference between a lapse and what is not disposed of, except as to construing intention. 1 *Ves. jun.* 67.]

["All my estates," in law and equity, in a will, will pass personally to be laid out in land. 1 *Ves. jun.* 204. 3 *Bro. C. C.* 99. *S. C.*]

[Testator devised his estate upon trust, that his mansion-house, park, garden, &c. pictures, plate, furniture, &c. (to go as heir-looms,) should by the trustee be kept in hand, and in good order and repair, till all incumbrances paid; upon farther trust to permit testator's daughter to have, hold, occupy, use, and enjoy his said mansion-house, park, garden, &c. pictures, plate, furniture, &c. for life; upon farther trust to lay out from rents and profits all he should think necessary to keep the mansion-house, &c. in repair; then to pay the daughter an annuity of 600*l.* for life, (for whom he also charged the estate with 10,000*l.*) and to apply the surplus in discharging the incumbrances, from which he excepted the mansion-house, &c.: he gave the trustee 200*l.* a-year above all charges; and after charges paid, limited the estate over; the daughter occupied the house till her death, afterwards the trustee lived in it; the daughter held to have had an equitable life-estate in the house, &c. as excepted from the general devise to the trustee; who therefore upon account was not allowed for rates and taxes paid, and expence of the garden defrayed by him during her life; but allowed for them afterwards, because under this will it was necessary for him to occupy either himself or by a servant. Allowed for necessary expence of procuring a thing to be done, which turned out to be reasonable, tho' he might have come to the court to see whether it was proper. Not allowed for costs of a suit against the daughter, voluntarily paid by him, even tho' she was entitled to them from the estate; nor for a park-keeper upon the trust-estate, because used as his own servant. *Fountain v. Pellet*, 1 *Ves. jun.* 337.]

[Testa-

[Testatrix's mistake not rectified, because nothing to shew what would have been her intention, if there had been no mistake. *Smith v. Maitland*, 1 *Ves. jun.* 362.]

(3 Y 8.) When a Devise gives a present Interest.

If a man devises 100*l.* to another to be paid at his marriage, or the age of 21 years; this is an immediate legacy; and if he dies before marriage or full age, it shall be paid to his executor. *R. Ch. R.* 112, *R. 2 Vent.* 34. 366. *R. Dy.* 59. *b.* in marg. *Vide 2 Ver.* 395. *Vide Devise*, (N 18.)

So, if he devises 100*l.* to another at his age of 21 years, to be paid with interest. *R. 2 Vent.* 342. *Skin.* 147. *2 Ver.* 137. *R. 2 Ver.* 508. 673. [*Vide 2 Brown*, 305.]

So, if he devises to his daughter for her marriage. *R. Dy.* 59. *b.* 1 *Ver.* 205. 324.

If he devises to his daughter, to be paid at the age of 21; if she marries at 18 the portion shall be paid. *2 Ver.* 424.

Otherwise, if he devises land to his son, with a charge to pay to his daughter at her age of 21 years. *R. 2 Ver.* 617.

So, if he devises portions to A., B., and C., his daughters, to be paid at their respective marriages; and if any of them die, her part to go to the survivors; A. dies; her part does not go to her sisters till their marriage; tho' the words are not repeated. *R. 2 Ver.* 620.

But if a man devises to another at his age of 21 years, without more; if he dies before that age it shall not be paid. *R. 2 Vent.* 342. *Acc. Dy.* 59. *b.*

And a devise at the age of 21, or to be paid at 21, is tantamount. *2 Ver.* 417. *R. Eq. R.* 12.

So, if he devises money to another to be paid at the age of 21, but if he dies before that age it shall go to A.; if both of them die before the first attains his full age, the money shall not be paid to the executor of the first, but to the executor or administrator of A. *R. 2 Vent.* 347.

If he devises at the end of ten years, tho' the event is certain, and not contingent, as marriage, or the age of 21, it is a lapsed legacy. *Per Couper*, *Sal.* 415.

So, if he devises at the age of 24, and the executor pays part at 21, and gives a bond for the residue, it shall be repaid. *Dub. 2 Ver.* 31.

If a man devises, that all his personal estate, after his debts and legacies paid, shall be laid out in the purchase of land; all but so much as is sufficient for the payment of the debts and legacies shall be immediately laid out for the purchase. *2 Vent.* 346.

If he devises land to A., upon condition that he pays 400*l.*, of which sum his wife shall dispose of 200*l.* by her will; if the wife makes no will, the 200*l.* goes to her administrator. *R. 2 Ver.* 181.

If he devises all his personal estate to his wife, and 1000*l.* to his grandson at the age of 21 or marriage; the grandson shall have the 1000*l.* immediately upon the contingency, and not wait for the death of the wife. *R. Eq. Ca.* 93.

But if a devise be, that the personal estate should be applied for a purchase within one year, or otherwise should be paid to some infants, equally to be divided; the interest in the personal estate does not vest in the infants

infants till the year is passed, and if one of the infants dies in the mean time, shall not go to his executor. *R. 2 Vent. 356.*

[If *A.* devises to his daughter *B.* 200 *l.* to be paid at her marriage, or three months after, provided she marry with his son's approbation, and gives her 12 *l.* *per annum* till she marry, and she dies of age, but not married, the legacy is not vested, and the administrator of *B.* can make no title to it. *Atkins v. Hiccocks, T. 1737, 1 Atkyns, 500.*]

[If *A.* entitled to the reversion of an estate after the death of his wife, devises it to *B.* and his heirs so as he should pay to *C.* 100 *l.* within six months after the reversion comes into possession, and gives the residue of personal to *B.* and another whom he makes executors; and *C.* dies in the wife's lifetime, the legacy is not vested, nor the representative of *C.* entitled to it. *Hall v. Terry, M. 1738, 1 Atkyns, 502.*]

[If *A.* gives part of his stock and trade to *B.*, provided he attains 21, and *B.* dies before it, his administrator is not entitled to the intermediate profits between the deaths of *A.* and of *B.* *Atkinson v. Turner, T. 1740, 2 Atkyns, 41.*]

[If a man gives to his brother *B.* the interest of 1500 *l.* during his life, and from his death the said 1500 *l.* among all the younger sons and all the daughters of *B.*, but if only daughters, then among the younger daughters, to be paid at 21, but that no elder son if more than one, nor elder daughter, if only daughters living at *B.*'s death, shall have any share; and *C.*, one of *B.*'s daughters, marries, attains 21, and dies before *B.*, and then he dies; her representative is not entitled to a share, for the legacy does not vest till *B.*'s death. *Billinsley v. Wells, T. 1745, 3 Atkyns, 219.*]

[If a man by will gives his grand-daughter 1500 *l.* to be at her own disposal if she marries with consent, and not otherwise, and she dies at fourteen unmarried, the legacy does not vest; for in all cases where the condition of marrying is annexed, there must be a marriage to vest the legacy. *Elton v. Elton, P. 1747, 3 Atkyns, 501. 1 Ves. 4. 1 Will. 159.*]

[If a grandfather devises his estate to his son for life, with power to raise a sum not exceeding 3000 *l.* for younger children, and to fix time of payment and interest, and if no appointment, the estate to be charged with 3000 *l.* payable to sons at 21, to daughters at 21 or marriage, nothing vests in the father's life; therefore the representative of one who attains 21, and becomes eldest son, and dies in his father's life, is not entitled to a share. *Loder v. Loder, T. 1754, 2 Ves. 526.*]

If there be a devise of 400 *l.* to the children of *A.*, who has three daughters, and two of them die under age; their shares go to their administrators. *Eq. Ca. 106.*

[So, if a man devises portions to younger children, to be paid at their full age, and the infant dies before; the money goes to the executor or administrator of the infant. *R. 2 Vent. 342. R. Ibid. 366. 1 Ver. 205. 324. 462.*

So, if he devises portions to them to be paid out of his land. *R. 2 Vent. 367.* Where the portion is vested. *2 Ver. 508.*

But if a man settles land for the payment of portions to younger children, to be paid at full age, and one dies before, his portion shall go to the

the heir of the land, and not to the administrator of the infant. For the land is only trusted with the payment. 2 Vent. 367. 2 P. W. 276. *Vide ante*, (3 P. 3.)

So, if by the settlement he refers to his will, and by his will devises the same portions to be paid according to the settlement. R. 2 Vent. 367. 2 Ver. 439.

So, if a legacy is to be paid at the full age of an infant, if it does not carry interest, tho' it be vested, the executor shall not have it till the infant would have been 21. 2 Ver. 199. 2 P. W. 277.

So, if a man devises land to his heir, charged with 3000 l. for the portion of a daughter at the age of 21 or marriage, if she marries with consent, otherwise 1000 l. The daughter dies before, the portion sinks for the benefit of the heir. R. 2 Ver. 417.

[If a legacy is to be paid to an infant at his age of 24, and a certain maintenance in the mean time, his executor shall not have it till the infant would have been 24; but if it had carried interest, he would have had it immediately. *Harrison v. Buckle*, M. 6 G. Str. 238.]

[If lands are devised to trustees to raise and pay 1500 l. to a daughter within six years after testator's death, with interest till paid, for her maintenance, and she marries and dies within the six years, the money goes to her administrator, and the interest ceases at her death. *Cowper v. Scot*, H. 1731, 3 P. W. 119.]

[If land is charged with portions, and no time appointed for payment, it is payable presently, becomes an interest vested, and goes to the executor. *Ibid.*]

[If one directs his debts and legacies to be paid out of his personal estate, and if that is not sufficient, his executor within 12 months to sell or mortgage his real estate for that purpose, and gives 1000 l. to A., who dies within a year, and personal estate is not sufficient, the legacy is vested, and shall go to A.'s executor. *Wilson v. Spencer*, H. 1732, 3 P. W. 172.]

[If a man devises 1000 l. to each of his daughters to be raised and paid at the death of his wife out of his real estate, with interest from her death till paid to his daughters, or their respective executors, and if either of them die in his lifetime, then the whole sum to go to the survivor, and not to sink in the estate for the benefit of the heir, and one daughter dies before the mother, her 1000 l. shall be raised and paid to her representative. *Lewther v. Condon*, H. 1740, and T. 1741, 2 Atkyns, 127.]

[If A. by his will gives his estate to trustees, and their heirs, to pay debts and legacies, and then to stand seised for the use of B. and the heirs of his body, and for default to such person, and for such estate as A. shall appoint, and for want of appointment to his own right heirs; and the trustees to pay such maintenance to B. during his minority as A. shall appoint; and by codicil directs that the trustees shall pay the rents and profits during B.'s minority to C., who is to allow such maintenance to B. during his minority as she thinks fit, the residue to her own use, and by another codicil directs the trustees not to convey to B. till 26, and till then he is to have such maintenance as C. and the trustees think fit; the rents and profits vest in B. at 21, tho' the time of receiving is prolonged to 26. *Smith v. Newport*, T. 1742, 2 Atkyns, 344.]

[If a sum is given to be divided between several brothers and sisters at 21, or day of marriage with consent, and if any die before 21, or marry without consent, their shares to go to the others at 21 or marriage with consent; and one dies after 21, and then two marry without consent, the representative of the deceased is entitled to his share of the two forscitures. *Channey v. Graydon*, T. 1743, 2 *Atkyns*, 616.]

[If a man gives two thirds of his real estate to his son and his heirs for ever, but in case he dies before 21, or without issue, then to his wife, her heirs and assigns; it is a vested estate in the son at 21, and shall go to his heir at law, tho' he die without issue. *Walsh v. Peterfon*, M. 1744, 3 *Atkyns*, 193.]

[If a woman gives to her daughter all her personal estate to be sold, &c. as she thinks fit, to pay debts, and the residue to be paid and divided between A. and B., her grandchildren, at 21, or sooner if the daughter thinks fit, and makes her executrix; as she is only trustee for her children, the legacy vests at testatrix's death, and if B. dies it is transmissible to A. *Steadman v. Palling*, H. 1746, 3 *Atkyns*, 423.]

[If A. devises 1500 l. to B. when he attains 25, and empowers his executors to lay it out, and apply the interest for B.'s education, and part of the principal to put him apprentice, and the remainder to be paid him at 25; this shall be construed a vested legacy, and only payment postponed. *Fonereau v. Fonereau*, T. 1748, 3 *Atkyns*, 645, 1 *Vesf.* 118.]

[If a man devises 400 l. to be put out on security for A. that he may have the interest for life, and for the heirs of his body, and if he dies without heirs, then over; the whole vests in A. and the devise over is void, as too remote. *Butterfield v. Butterfield*, M. 1748, 1 *Vesf.* 133. 154.]

[If a man gives his son 400 l. to be paid in a year after his death, and 100 l. at the death of his mother, the 100 l. is a vested legacy, for the words *to be paid* must be applied to this also. *Jackson v. Jackson*, H. 1748, 1 *Vesf.* 217.]

[If a man after his daughter's marriage, when she has only one daughter, A. devises his personal estate to A. and all children his daughter may have, equally, to be paid as soon as they are able to receive and discharge; it vests in each child as soon as it comes in esse, and is transmissible, tho' subject to be varied, and does not wait the vesting till the death of testator's daughter. *Exel v. Wallace*, H. 1750, 2 *Vesf.* 117.]

[If A. by codicil desires his sister B. out of the money given her by his will to leave 500 l. at her death to C., and C. survives A., and dies before B.; C.'s representative shall have it paid by B.'s representative. *Medlicot v. Bowes*, H. 1748, 1 *Vesf.* 207.]

[If a man devises the residue of his personal estate to A. his grandson at 21, and if he dies before, to B., A. shall not have the interest during his minority, but it shall accumulate till he is 21. If A. should die before, whether his representative or B. should have it. *Butler v. Freeman*, T. 1743, 3 *Atkyns*, 58.]

(3 Y 9.) When a Legacy carries Interest.

If a man devises 100 l. to an infant, to be paid at such an age, and does

does not make provision for his maintenance in the mean time, he shall have interest, and it does not accrue to the benefit of the executor. *Per Cur.* 31 *Car.* 2. 2 *Vent.* 346. *Vide ante*, (3 *R.* 6.)

[If a vested legacy, payable at 21, be given by a father to a child who has no other provision, it shall carry interest, but not if given by a grandfather. *Haughton v. Harrison*, *T.* 1742, 2 *Atkyns*, 329.]

So, if it is to an infant at his full age. 2 *Vent.* 346. *R. upon Demurrer*, *Ca. Ch.* 60.

If a man devises that his personal estate shall be laid out for the purchase of land, but if his wife is enfeint with a daughter, that she shall have 3000 *l.* at her marriage, if she marries with the consent of her mother, otherwise 1000 *l.* only, and that the mother shall have 80 *l.*, part of the interest of the 3000 *l.*, for the education of the daughter; the daughter shall have the whole interest of the 3000 *l.*, and not the 80 *l.* only. *R.* 31 *Car.* 2. 2 *Vent.* 346.

[If a man devises 400 *l.* to a woman to be laid out in a purchase, her husband shall have interest for the 400 *l.* from the time of exhibiting his bill for it. *R.* 2 *Vent.* 356.

If a man devises 100 *l.* to one of full age, without saying, at what time, he shall have interest from the time of the bill filed. *Sal.* 415.

If the day of payment is limited, he shall have interest from that day. *Ibid.* 1 *Ver.* 262.

[If *A.* gives 500 *l.* to his grand-daughter, to be paid at 21 or marriage, and if she dies before either, then gives it to another: she is not entitled to interest, nor to have the principal secured. *Palmer v. Mason*, *M.* 1737, 1 *Atkyns*, 505.]

[If a man by will gives 1000 *l.* a-piece to five brothers and sisters, (not his relations,) to be paid at 21, if they attain that age, and not otherwise, and if any die before, the respective legacy to be void; and till they attain 21, or, if the legacies become void, empowers his executors to lay out the money for the purposes of his will; the legacies bear no interest, nor shall be particularly secured. The purposes of the will relate to the residuary as well as other legatees. *Heath v. Perry*, *T.* 1744, 3 *Atkyns*, 101.]

[If a legacy is given generally at 21 or marriage, or even if given to *A.*, payable at 21, and so vested, yet it carries no interest, unless in the case of a child who has no other provision; for there the court always gives interest by way of maintenance. *Ibid.*]

[If a woman by will gives her daughter 100 *l.* per ann. till ten years, and then 50 *l.* more till 21, for maintenance and education, and gives her 8000 *l.* to be paid at 21, or if she dies before 21 without issue living at her death, then to *A.*; this legacy shall not carry interest. *Hearle v. Greenbank*, *P.* 1749, 3 *Atkyns*, 695, 1 *Ves.* 298.]

If legacies are given in such proportion as the executor shall appoint, and a year is given him to make distribution; the executor shall pay interest from the end of the year, if he does not make distribution; for the public funds are ready to receive. *R.* 2 *Ver.* 745.

But a man of full age shall not have interest for a legacy till his bill is exhibited, if the time of payment is not mentioned by the will. *Sal.* 415.

Nor,

Nor, an infant, till a year is expired after the death of the testator. *Sal. 415. Semb. cont. 5 Geo. 2. 13.*

[When legacies are devised out of a real estate, or there is other real sufficient fund to answer them, if no time is appointed for payment, they shall carry interest from the time of testator's decease, or at least from a year after. *Bilson v. Saunders, M. 1727. Bunb. 240.*]

[If a man gives his niece a legacy, payable a year after his death, and afterwards her husband, apprehending it was not payable till her marriage, receives interest on it only from her marriage, and the legacy itself, and gives a receipt in full, yet equity will decree him interest from a year after testator's death. *East v. Thornbury, H. 1731, 3 P. W. 126.*]

[If there is a proviso in a settlement, that if husband and wife die, leaving issue unprovided for, trustees may enter on an estate and take the rents till they have received 200*l.* for the benefit of such unprovided children, and in such manner as the survivor of husband and wife shall appoint, and the wife survives, and appoints the 200*l.* to the only unprovided child. Interest shall be allowed from the death of the mother, tho' the estate is sold to a purchaser. *Green v. Belcher, H. 1737, 1 Atkyns, 505.*]

[If a legacy is given to be divided among younger children as the mother pleases, it shall bear interest from one year after testator's death, and being vested, shall not accumulate, but go for their maintenance till divided. *Coleman v. Seymour, H. 1748, 1 Ves. 209.*]

[A legacy from an uncle to a niece, to be paid at 21 or marriage, does not carry interest before the time of payment. *Crickett v. Dolby, 3 Ves. jun. 10.*]

[Legacy from a parent to a child bears interest before the time of payment, and from the death of the testator. *Ibid. 13.*]

[A grandchild falls within the same principle. *Semb. ibid. 12.*]

[Legacy payable at 21, before which time the legatee dies: if interest is payable, his executor shall have the legacy immediately; if not, he must wait till the legatee would have been 21, and cannot then have the interest. *Ibid.*]

[A wife as well as a child is within the exception to the rule, that a legacy does not bear interest till it is payable. *Semb. ibid. 16.*]

[So, a natural child. *Ibid. 12.*]

[Legacy from parent to child, payable *in futuro*; if maintenance be given generally, it shall carry interest; but if an annual sum less than the interest be given for maintenance, the executor paying that shall have the rest. *Ibid. 17.*]

[Legacy payable at 21, with a proviso to go over, if the legatee should at any time become seised of the real estate, to which he was entitled in remainder after an estate-tail limited on an estate for life. Supposing there is a contingency left, he must have the legacy at 21; it may be disputed afterwards when the contingency arises. *Griffiths v. Smith, 1 Ves. jun. 97.*]

[Residuary clause is a mark of intention that there should be something to satisfy it, but not of itself conclusive. *1 Ves. jun. 151.*]

[Latent ambiguity arises *dehors* the will, and evidence is admissible

missible to explain it; not to explain a patent ambiguity on the face of the will. 1 *Ves. jun.* 259.]

[Will is ambulatory, but a specific bequest is fixed, as much as a devise of land. *Ibid.* 260.]

[Annuity bequeathed to *A.*, by a wrong name, remainder to his children by his present wife. It appeared that testator had been in the habit of calling *A.* by such name. *A.*'s children held to be entitled. *Parsons v. Parsons*, 1 *Ves. jun.* 266.]

*[Testator bequeathed to his wife the lease of his house, and all the furniture, &c. then for life the interest of all money he should die possessed of; then half of the debts due to him at his death, (one excepted, which he directed debtor to retain as long as he pleased, paying the interest to her,) to be disposed of as she thought fit. In case the interest of the money he should die worth should not be sufficient for her maintenance, executors to allow part of principal out of the debts, except that before excepted, to make her life easy and comfortable; after her death, interest of all money remaining to his sister; after her death to her daughter all sums remaining for ever; if they die before his wife, one half of all sums remaining to be disposed of as his wife should think fit, the other to *A.* Upon bill by testator's niece against executors of the wife, the niece held entitled to all beyond the debts, and a moiety of all debts, but that excepted; the other moiety to wife's executors, who being also executors of testator, were decreed to take out of wife's share a sum advanced under their power. *Collet v. Lawrence*, 1 *Ves. jun.* 268.]

[An express immediate disposition in a will not controlled by subsequent inference. *Ibid.* 269.]

[Testator devised to his wife several houses, to his sisters his money in securities for their lives, then divided his fortune into small legacies, but the legatees to take nothing till the death of his wife and sisters, and made residuary legatees, under the following clause, "I empower my wife to give away at her death 1000 *l.* to *A.* and *B.*, 100 *l.* of it each, the rest to be disposed of by her will:" there is no absolute legacy, but a naked power to the wife, who being dead without any disposition, the objects specified are not entitled. *In the Exchequer*, *Bull v. Vardy*, 1 *Ves. jun.* 270.]

[Testatrix directed all her estate to be turned into cash; if amounting to 20,000 *l.* to go thus: if less, in similar proportions; then subject to some debts, legacies, &c. the residue of her estate in sixteenths, two to her mother for life, the others to different persons absolutely. She then made three residuary legatees. The shares given are only of the 20,000 *l.* subject to the charges; all beyond that goes to the residuary legatees. *Green v. Scott*, 1 *Ves. jun.* 282.]

[Interest of the residue of personal property bequeathed to *A.* for her life, then the residue to her nieces, and if they die without issue, over: the last limitation over is too remote, and on the death of *A.* her nieces take the whole. *Everest v. Gill*, 1 *Ves. jun.* 286.]

[Testator after giving life interests in stock to each of his daughters, afterwards the principal among his grandchildren, in pursuance of a power in articles of partnership appointed his executors to carry on the trade in his room, with power to dissolve or nominate any other person, and gave them his share of the capital, and all his freehold and leasehold estates, on trust to carry on the trade as long

long as they should think fit; and after expiration of partnership to sell the estates, and with the produce and profits of the trade, and all the rest of his estate, to form a fund to accumulate 12 years, then among the grandchildren living: by codicil he substituted his partner, who was his son-in-law, in the room of one executor removed; and desired, that if his executors should continue trade, and his grandsons T. and J. should attain 21, his executors would nominate each a partner for a quarter, when executors should think fit, with legacies at the same time; to sink into the estate if they should decline the partnership, or die before 21; executors to advance any further sum they might want to carry on trade, the rest of his property among all the grandchildren except T. and J. By another codicil he left it entirely in the discretion of the executors to appoint J. or not; if they should not think proper, his legacy to be void; T. and J. held both entitled to be partners, and to their legacies at 21, one executor, their father, being for admitting them, the other two against it; but if all had without fraud united in declaring J. unfit, they might have excluded him: in which case he could have taken nothing under this devise. *Wainwright v. Waterman*, 1 Ves. jun. 311.]

[Legacy of a fund in the *East Indies*, given over in case of the death of legatee before he might have received it, held to be vested from the death of the testator. *Hutchin v. Mannington*, 1 Ves. jun. 366.]

[Bequest of all testator's personal property, except his plate, "which is hereinafter given to my daughter," to his wife, and after her decease over. The plate not being further noticed, held to be undisposed of. *Frederick v. Hall*, 1 Ves. jun. 396.]

[Legacies in trust for all grandchildren then in existence by name, to sons at 23, to daughters at 21, mesne interest for education, surplus to accumulate, with survivorship for want of issue; residue for all the grandchildren generally for their benefit "as aforesaid." By codicil a fund set apart to pay life annuities. Grandchild born after testator's death held not entitled to a share of the residue, into which the fund under the codicil was to fall after the purpose answered. *Hill v. Chapman*, 1 Ves. jun. 405. 3 Bro. C. C. 391. S. C.]

[Testator devised to all the children of his two sisters A. and B.: A. long before the date of the will changed her religion from the Jewish to the Roman Catholic, was baptised by a new name, and became a professed nun at Genoa. Bill by the children of C., a third sister, living with B. at Leghorn, on the ground of mistake in testator, and evidence of his intent to provide for his sisters at Leghorn, dismissed. *Delmare v. Robello*, 1 Ves. jun. 412. 3 Bro. C. C. 446. S. C.]

[Devise of lands to be sold in aid of personal, "and after death of my wife the estates not sold, and the personal not applied to be subject as after-mentioned; the rents and produce to be carried on in accumulation of 3 per cents. as aforesaid during her life, and also for five years after her death, and to be laid out in land; then if my son M. shall be living, and any lawful issue of his body, and if my son G. shall be living, and any lawful issue of his body, to them for life, as tenants in common; then to their issue in moieties; if only issue of one, to that issue; if but one, to that one," with power of settlement; my wife to receive such provision as aforesaid, neat and clear, and the residue only to be subject to the devise over, to take place after

after her death; and if both my said sons shall be dead without issue," then to his daughter for life; after her death to her son, his heirs, &c.; and if she should have any other issue, to them, their heirs, &c. on failure of issue of his sons and grandson. The devise over is attached to the single event of both sons being dead, without issue, at the death of the wife, or five years after at most: and one son being alive at that time, tho' without issue, it never took effect. But the son is not entitled to the estate absolutely on account of the contingent interest in his issue. *Graves v. Bainbrigge*, 1 *Ves. jun.* 562.]

[*A.* devised to trustees to pay debts, and then to hold till his son should attain 21, then to the son, he paying the testator's father 10*l.* per quarter. The annuity held not to commence till the estate of the son came into possession. *Turner v. Probyn*, 1 *Anstr.* 66.]

[Devise to *A.* for life, with liberty to leave the property to whom she thought most deserving of it; recommending to her to have a due regard to the testatrix's mother's relations is not mandatory as to the objects of the appointment. *Randal v. Hearle*, 1 *Anstr.* 124.]

[*C. F.* compounded with his creditors; his widow by her will left a fund to pay the residue of the debts to the compounding creditors, or their personal representatives. The administratrix of a deceased creditor held entitled beneficially to this bequest, and not the next of kin, nor residuary legatee of the creditor. *Evans v. Charles*, 1 *Anstr.* 128.]

[*P. M.* gave by his will "to his three daughters 500*l.* each, to be paid them severally within five years after his decease, if then alive, or any issue of their several bodies, to be paid by his son, the residuary devisee; the interest from his death at 4 *per cent.* for so many years as his son should keep it in his hands of the five years; but if there should be no issue living from any of the said daughters, at the end of the five years, then an annuity for life of 20*l.* to be paid to them respectively; and the several sums of 500*l.* to be paid to them so dying without issue, should be equally divided between the survivors and their issue. One of the daughters died within the five years, leaving a son, and having previously assigned her interest. The son held to be entitled to the 500*l.* *Oseland v. Oseland*, 3 *Anstr.* 628.]

[Testator gave a legacy "to every of the sons and daughters of his late cousin, who left one legitimate daughter, and one son and one daughter illegitimate; the latter were held not entitled under the will, nor was evidence admitted of the intention of the testator. *Hart v. Durand*, 3 *Anstr.* 684.]

[Where testator by his will gave the residue of his property to his daughters, as tenants in common, and afterwards made a codicil expressly for a particular purpose, and thereby also again bequeathed the residue to his daughters, omitting the words of severance; the codicil was construed by the will, and they took as tenants in common. *Matthews v. Bowman*, 3 *Anstr.* 727.]

[Testator gave his wife 400*l.* a-year, in addition to 500*l.* a-year under her settlement, in consideration of the expence and care she would incur in the maintenance of their children; she must maintain them, when at home; but is not to be charged with their education or maintenance at school. *Collier v. Collier*, 3 *Ves. jun.* 33.]

[Legacy in trust to pay out of the interest of a mortgage 60*l.* a-year

a-year to the testator's wife for life, and the remaining interest during her life to R., Duke of M., and in case of his death to his eldest or only son, and for want of issue male, to his eldest or only daughter; for want of such issue female, to sink into the residue; and after the death of his wife the testator gave the principal to the said Duke, if then living, but if then dead, to his eldest or only issue male then living; and for want of such issue male, to his eldest or only daughter; for want of such issue female, to sink into the residue. R., Duke of M., died, leaving two sons and a daughter; both the sons died, the eldest left a son, Duke of M., who filed the bill, and was held entitled to the surplus interest; but that the principal was contingent till the death of the testator's widow. *Duke of Manchester v. Bonham*, 3 Ves. jun. 61.]

[Contingent legacy out of real and personal estate, payable two years after the event. By codicil the testator reciting, that he found his estate would not bear that payment during the life of A., being charged with an annuity for her life, revoked that part of his will, and that the said legacy on the same event was to be paid twelve months next after the death of A., and not before. A. dying before the contingent event, the legacy was held not payable till the expiration of the two years after it. *Wordsworth v. Younger*, 3 Ves. jun. 73.]

[The general rule, that a legacy payable in future shall not carry interest before the time of payment, applies to a legacy to infants payable at 21; the exceptions are, the case of a parent and child, the case of a residue, and where from other special circumstances an intention to give interest clearly appears. *Tyrrell v. Tyrrell*, at the Rolls, 4 Ves. jun. 1.]

[On the ground of an express maintenance, and other indications of the intention, the Lord Chancellor inclined to the opinion, that the rule for interest upon a legacy, given by a parent to a child, till the time of payment, was not applicable; but the bill of the children was dismissed upon circumstances of acquiescence, laches, and the consequent difficulty of taking the accounts. *Mitchell v. Bower*, 3 Ves. jun. 283. See also *Long v. Long*, *ibid.* 286. in *notis.*]

(3 Y 10.) When construed *cumulativè*, see *infra* (4 P).

If a man by his will gives to his children, which he shall have at the time of his death, 300*l.*, and afterwards having three children, by codicil gives 200*l.* to each of them, to be paid at their respective ages: this devise shall be construed by way of accumulation, so that each child shall have 500*l.* *R. Ca. Ch.* 301.

If a man has three nieces, and is indebted to one of them in 100*l.* and devises to her 300*l.* and to his other nieces 200*l.* each, and afterwards borrows another 100*l.* of the first; she shall have the legacy of 300*l.* over and above her debt: and no part of a legacy shall be applied to a debt, but where the intent appears by other circumstances that it shall. *R. 1 Sal.* 155. *Cont. per Trevor, Master of the Rolls*, but *Harcourt acc. Sal.* 508. *Acc. 2 Ver.* 593, 4.

[So, a legacy less than a debt shall not be intended to be in lieu of the debt. *Sal.* 508. *2 Ver.* 259. 478. 505. *2 P. W.* (617.)

[If a larger legacy be given to the same legatee in the same will, after a less, he shall take both. *2 Brown*, 225.]

[Testator

[Testator created a term for debts and legacies, and gave 1000 *l.* to his niece to be paid immediately after his decease, if she should be then married, if not, the interest of her said legacy to be paid her for life, to be calculated and paid to the day of her death, or marriage: if she should die unmarried, the legacy to lapse for the benefit of the estate. By codicil he gave her 200 *l.* in addition to what he had given her by the will; held by M. R. that the additional legacy is to be raised out of the same fund, and subject to the same conditions; and legatee, having married after testator's death, to be entitled. *Crowder v. Clowes*, 2 *Ves. jun.* 449.]

[Legacy by will; the same sum given by codicil to the same person, on a contingency, was held conditional. *Hodges v. Peacock*, 3 *Ves. jun.* 735.]

[A thing given in satisfaction must be of the same nature, and attended with the same certainty, as that in lieu of which it is given; so, land is no satisfaction for money, nor money for land, nor a thing subject to a contingency. *Bellasis v. Uthwatt*, H. 1737, 1 *Atkyns*, 426.]

[If *A.* gives *B.* a bond for 300 *l.* and interest, and three years after pays 100 *l.* and all interest, and five years after by his will devises lands to trustees, to pay *B.* 200 *l.* in two years after his death, and other lands to the same trustees to pay *B.* 200 *l.* in one year after his death; these legacies are not a satisfaction for the bond, for they are payable at a future time, the bond immediately; and they are also contingent. *Nicholls v. Judson*, P. 1742, 2 *Atkyns*, 300.]

[If a man by will gives 1000 *l.* each to his two sisters, and if either die before the legacy paid, the whole to the survivor, and the legacies to remain in his executor's hands till their respective ages of 21; and afterwards gives a bond to each for 4000 *l.* conditioned for payment of 2000 *l.* provided she marry in his life with his consent, or that she survives him; they are entitled to the legacies, and to the bonds, for they are on contingencies. *Spinks v. Robins*, H. 1742, 2 *Atkyns*, 491.]

Or, given upon condition; for if the condition is not performed, the legacy will be lost. *Sal.* 508. *Eq. R.* 89.

Or, where the devise is of land. *Sal.* 508. *R.* 2 *Ver.* 298. *Vide* 5 *Geo.* 2. 36. 2 *P. W.* (616.)

[If *A.* being indebted 260 *l.* by bond to her servant *B.* by her will gives her 500 *l.* to be paid three months after *A.*'s death, and in another part says, I give 5 *l.* a-piece to the rest of my servants, but not to *B.*, for I have done very well for her before; and by a latter clause gives her lands in trust to pay debts and legacies; the legacy is not a satisfaction for the bond, but *B.* shall have both. *Richardson v. Greefe*, H. 1743, 3 *Atkyns*, 65.]

If a man indebted to *A.* devises to him a sum equal to or greater than his debt, it shall be taken to be in satisfaction. *Eq. R.* 89.

Or, gives it by settlement. *Ibid.*

Otherwise, if there was an open account, and it was uncertain whether he was indebted to him or not. 1 *P. W.* 299.

Or, if the debt was contracted after the will. *Ibid.*

So, where, before his will, a man declares that he will augment his daughters' portions, and docks the entail with such intent; they shall

shall have their portions, and also the addition by the will. *R. 1 Ch. R. 200.*

[If husband by will gives annuity to his wife, by codicil 600*l.* more, and an hour before his death orders his servant to deliver to his wife there present two bank-notes, payable to bearer, for 300*l.* each, and a note, not payable to bearer, for 100*l.* saying he had not done enough for her; this gift of the two 300*l.* is a *donatio causa mortis*, and is not a payment of the legacy. *Miller v. Miller, T. 1735, 3 P. W. 356.*]

[A legacy of 1000*l.* to a wife shall not be construed as a satisfaction for a deficiency in her jointure, but as a bounty to her. *Probert v. Morgan, P. 1739, 1 Atkyns, 440.*]

[So, if *A.* on marriage settles 300*l.* long annuities, in trust for himself for life, to his wife for life, to his children as he shall appoint, and if none, to his executors, &c. and has one child, and by his will devises all his real and personal to his wife and her heirs, charged with 10,000*l.* to his daughter, payable at 18; she is entitled to the long annuities, and to the 10,000*l.* out of the personal and real estate. *Bellasis v. Uthwatt, H. 1737, 1 Atkyns, 426.*]

[If a freeman of London directs his testamentary third to pay debts, and the residue to be divided among his wife and [six] children, and then marries one of his daughters, and gives her 1000*l.*, which in the marriage articles is called her portion or provision, and dies, the daughter nevertheless shall have her seventh part of the residue for a subsequent portion, tho' an ademption of a liquidated legacy is not so of a residue. *Farnham v. Philips, M. 1741, 2 Atkyns, 215.*]

[If a man by will directs his executors to place out 1000*l.* at interest, to apply what they think necessary for the maintenance of his grandson *A.*, and that they might apply all or any of it in putting him apprentice, or setting him up, and what is not so applied to be paid him at 21, and if he dies before, to *B.*, *C.*, and *D.*, testator's children, and afterwards testator puts *A.* apprentice, and gives 120*l.* with him, then makes a codicil, and dies; *A.* shall have the whole 1000*l.* *Roome v. Roome, H. 1744, 3 Atkyns, 181.*]

So, where by his will a provision is made of 1000*l.* a-piece for every child after born; and a son being born, he afterwards gives to him 4000*l.*, whereby he says he will have 5000*l.* *R. Ch. R. 267.*

If a son devises to his sisters a greater sum than was secured by the settlement of his father, and then devises the estate to his heir male; it shall not be in lieu of the portions by the settlement. *R. 2 Ver. 260. in Parl. tho' it was decreed cont. in Chancery. 2 Ver. 177.*

[If *A.* gives 2000*l.* in trust, to pay the interest to his wife for life, then the benefit of the principal to his son, but if he dies before 21, then gives it over to his daughters, the son attains 21, the 2000*l.*, with the rest of the estate, continues always in the stock in trade; the son makes his will, without any reference to the father's, and gives the interest of 10,000*l.* to his mother for life, and then the principal to his sister *S.*'s children, charges it on his real and personal estate, to be paid a month after his death; this interest of the 10,000*l.* is not in satisfaction of the interest of the 2000*l.* *Clark v. Sewell, T. 1744, 3 Atkyns, 96.*]

[If a father leaves a legacy generally, and afterwards gives a portion, whether greater or smaller than the legacy, it is an ademption of it; so, if a collateral relation to an orphan under his care; but if a collateral give a legacy to one whose father is living, and afterwards advances him, it is not an ademption. *Shudal v. Jekyl*, H. 1742, 2 *Atkyns*, 516.]

[Or, if a father (and *a fortiori* a collateral) gives a legacy, and afterwards gives a portion, declaring at the same time that he intends to leave something, but will not be bound, it is not an ademption. *Ibid.*]

[Portion held to be a satisfaction of a legacy from the father to the same amount; the evidence not being sufficient to repel the presumption. *Ellison v. Cookson*, 1 *Ves. jun.* 100. 3 *Bro. Ch. Ca.* 61. S. C.]

If a bond is given to settle 100 *l.* *per ann.* or to pay 2000 *l.*, a devise of 80 *l.* *per ann.* shall not be a satisfaction *pro tanto*, if there are assets to pay all debts. *R. 2 P. W.* (617.)

[If a man is a general debtor for two annuities, one of 10 *l.* and another of 6 *l.*, and by will gives another of 10 *l.*, it shall not be a satisfaction for either, but shall accumulate. *Graham v. Graham*, T. 1749, 1 *Ves.* 262.]

[But if he grants one on a condition, and secured by deed, out of a particular estate, and the other by bond only, the annuity by will shall be a satisfaction for the latter. *Ibid.*]

[If a man in his will gives an annuity to A., and also recites the amount of a debt due from him to A., and orders it to be paid, A. may claim the legacy, and yet not abide by the testator's calculation of the debt due to him; for his intention was, that the full debt should be paid. *Clarke v. Guise*, T. 1755, 2 *Ves.* 617.]

[The rule, that legacies to the same persons by different instruments shall be accumulative, repelled by internal evidence of an intended substitution. *Allen v. Callow*, at the Rolls, 3 *Ves. jun.* 289.]

[Testator by his will gave legacies to A. and B., describing them as grandchildren of C., and their residence in America; by a codicil he revoked these legacies, giving as a reason that the legatees were dead; that not being the fact, they were held entitled, on proof of identity. *Campbell v. French*, 3 *Ves. jun.* 321.]

[The rule, that legacies to the same persons by different instruments shall be accumulative, repelled by internal evidence; and the circumstance that all the legatees by the first instrument were legatees in the second, except such as were dead or had quitted the testator's service. *Barclay v. Wainwright*, at the Rolls, 3 *Ves. jun.* 462.]

[Ten thousand pounds provided by settlement for one daughter or younger son; 15,000 *l.* if more; there being but one daughter, the father, by will under a power reserved to him, appointed the time of payment, and the application of the interest of the 15,000 *l.* provided for her by settlement, and gave her the farther sum of 5000 *l.*; she was held entitled to 20,000 *l.* *Phipps v. Lord Mulgrave*, 3 *Ves. jun.* 613.]

[Two annuities of equal amount in the same will to the same person held not accumulative. *Holford v. Wood*, at the Rolls, 4 *Ves. jun.* 76.]

[A will restrained in point of extent to a partial disposition by a particular

particular enumeration, and a reference to other instruments, notwithstanding the general words "personal estate." 4 *Ves. jun.* 76.]

[Specific disposition by will, subject to annuities and legacies, held auxiliary only; the general personal estate to be applied in the first instance. *Ibid.*]

[Legacies to be paid out of a specific security, which failed, held general on the circumstances. *Roberts v. Pocock*, 4 *Ves. jun.* 150.]

[Bequest to A., and in case of her death to B., held an absolute interest in A. *Hinckley v. Simmons*, 4 *Ves. jun.* 160.]

[Testator gave all the residue of his personal estate to his wife, except such parts as should be in and about his house, which parts he gave to his son, and directed the household furniture to go as heirlooms, and gave all arrears of rent which should be due to him at his death to his son; a bond to secure an old arrear of rent, and cash, both found in an iron chest, in which the steward kept the cash arising from the rents, held to belong to the residuary legatee. *Jonas v. Lord Seston*, 4 *Ves. jun.* 166.]

[Testatrix gave nine legacies of 1000*l.* each, part of 14,500*l.* *South-Sea* annuities; and as to the residue of the said fund, and all other her personal estate, including such of the said legacies as should lapse by death, before they should be transferable, upon trust to convert into money such part of her residuary personal estate as should not consist of *South-Sea* annuities, and invest such money with any money belonging to her at her decease, in said fund of *South-Sea* annuities, and from time to time invest the dividends, &c. of all such *South-Sea* annuities as should constitute her residuary personal estate in the same fund, till the youngest of said legatees should or would, if living, attain 21; and then to transfer the whole of such *South-Sea* annuities to such nine legatees equally, with such survivorship as their original shares: the nine legacies of 1000*l.* each only are specific, the remainder of the *South-Sea* annuities is part of the general personal estate. *Richardson v. Brown*, at the Rolls, 4 *Ves. jun.* 177.]

[Legacy to a female infant, with power to trustees, in case of misbehaviour or marriage without consent, to diminish it; and which legacy was comprised in a miscalculation of the number of legacies, which were given over to the wife in case of the legatee's dying before she should become entitled, lapsed by the death of the legatee; tho' by the words of the gift it would have been vested. *Moleworth v. Moleworth*, 3 *Bro. C. C.* 5.]

[A gift of 100*l.* to the four children of A. to be equally divided, considered as separate legacies. *Ibid.*]

[Testator living in *Antigua* gives legacies described to be sterling; then another without that description, the interest to be paid to the children of I. G. and Mrs. L. for life; then the principal to be divided among the grandchildren of I. G. and Mrs. L.; 1st, the legacy is only of current money of *Antigua*; 2dly, the interest to be paid to the children for life, shall be at 4 per cent. not *Antigua* interest; 3dly, there being no children of I. G. the children of Mrs. L. shall take the whole interest for their lives, nothing passing to the grandchildren till the death of all. *Malcolm v. Martin*, at the Rolls, 3 *Bro. C. C.* 50.]

[Testator ordered his trustees, out of certain funds, to pay to his wife what

what should be returned to her of her portion, and to invest the residue in funds to pay her the interest for life, then to pay the interest to his niece for life, then to pay the principal to her children, if any; if not, to the younger children of *H. W. W.*, if any; if not, to the defendant *W. W.*, and gave the residue of his effects to his wife. Neither the niece nor nephew had children; the intermediate interest from the death of the niece to that of the nephew shall not follow the principal, but fall into the residue, and go to the wife's executor, as personal estate of the testator undisposed of. *Wyndham v. Wyndham*, 3 Bro. C. C. 58.]

[Gift of residue to be divided among the next of kin share and share alike, shall be divided among surviving brothers, nephews, and nieces, representing deceased brothers and sisters *per capita*, not *per stirpes*. *Philips v. Garth*, 3 Bro. C. C. 64.]

[Legacy to *A.* for life, remainder to *B.* and *C.*, or in case one should die living *A.* then to the survivor; *B.* and *C.* both die in the life of *A.*; the legacy held to be vested and to go to the survivor. *Scurfield v. Howes*, 3 Bro. C. C. 90.]

[Jewels, &c. given to the wife for life, and then to such grandchildren as she shall appoint; if she make no appointment, they shall go equally. *Witts v. Boddington*, 3 Bro. C. C. 95.]

[Legacy given to *A.* to be divided between himself and his family, is well paid to *A.* *Cooper v. Thornton*, at the Rolls, 3 Bro. C. C. 96.]

[Legacy to the 7th or youngest child of *A.*: *A.* had six children at the testator's death; and had had another who soon died: afterwards the plaintiff was born, and was the 7th child living, but 8th in order of birth; held he did not bear the description, and there being a child younger than he, there was a decree in her favour. *West v. The Lord Primate of Ireland*, 3 Bro. C. C. 148.]

[A legacy given to *A.* to be divided between himself and his family; the executor pays the legacy to *A.*; it is well paid to discharge the executor. *Cooper v. Thornton*, 3 Bro. C. C. 186.]

[Testator gave a residue to trustees to pay the interest to four persons for life; and after decease of the survivor, then to divide the principal among their children; two died, the interest shall be paid to the other two. *Armstrong v. Eldridge*, 3 Bro. C. C. 215.]

[Bequest of residue to certain persons, and if they should die in the lifetime of the testatrix, to their legal representatives; one died, his next of kin shall take the share of the residue; not his executor beneficially, nor his residuary legatees. *Bridge v. Abbot*, at the Rolls, 3 Bro. C. C. 224.]

[Gift of a residue to be divided among persons related to the testator confined to relations within the statute of distributions. *Rayner v. Moubray*, 3 Bro. C. C. 234.]

[Estate for life in personality by implication. *Ramsden v. Hassard*, 3 Bro. C. C. 236.]

[Testator ordered the interest of the residue to be paid to his sisters for life, and in case any of them should die leaving issue, then to transfer the principal of the *residuum* to the children of the sister so dying, at 21: one of the sisters died in the life of the testator; her children shall take her share of the residue. *Rheeder v. Ower*, 3 Bro. C. C. 240.]

[Where stock was left to pay the interest to plaintiff for life, and then after payment of gross sums, the residue to him, his executors, &c. the court would not permit the security to be lessened by laying out a certain sum to secure the legacies, and paying the residue immediately to the plaintiff. *Soundy v. Binyon, at the Rolls, 3 Bro. C. C. 258.*]

[Gift by will of pictures to lady — absolutely void, and the question shall not go to the master, nor the gift be supplied by parol evidence. *Hunt v. Hort, 3 Bro. C. C. 311. Sed vide 3 Ves. jun. 148.*]

[Bequest of "all my cloaths and linen whatsoever," passes body linen only. *Ibid.*]

[Testator having two estates in mortgage, orders the debt upon one to be paid out of his personal estate, and charges the other upon the mortgaged premises, and gives the residue of his personal estate to persons by whose death it afterwards lapses: the mortgaged debt charged upon the mortgaged premises shall be paid out of the personality. *Hall v. Cox, 3 Bro. C. C. 322.*]

[Testator ordered his real estate to be sold, and the residue to be laid out in the funds, to remain for ten years, and at the end thereof gave the same to his next of kin; the next of kin at the time of the death would have been entitled to take, and the testator having but one brother who was such next of kin, and who died within the ten years, it was held lapsed, and that so much as was produced by the real estate reverted to the heir at law of the testator, and so much as was personality to the representatives of the brother. *Spink v. Lewis, 3 Bro. C. C. 355.*]

[Legacy to A. and B. the children of C. equally; they take *per capita*. *Butler v. Stratton, 3 Bro. C. C. 367.*]

[Legacy to the descendants of A. and B. equally; all descendants children and grandchildren take *per capita*. *Ibid.*]

[Legacy to a *feme covert*, "her receipt to be a sufficient discharge to the executors," is equivalent with the expression, "to her sole and separate use." *Lee v. Prieaux, at the Rolls, 3 Bro. C. C. 381.*]

[Bequest of a residue to all the children of A., the daughters' shares to be paid at 21 or marriage, the sons' at 21, or to be sooner advanced for their benefit, with survivorship and interest for maintenance; the fund shall be devisable when the eldest attains 21, and the division shall be among those then *in esse*. *Andrews v. Partington, 3 Bro. C. C. 401.*]

[When the testator expresses his intention incorrectly, the court will effect it by supplying proper words: where money is given to be laid out in land for a place of retirement for testator's sister, "to be for ever entailed on her issue," the husband of one of the daughters of the sister was held entitled as tenant by the curtesy to one-third; gift of a residue to children not to be claimed till 22, but the interest given in the mean time is vested. *Dodson v. Hay, at the Rolls, 3 Bro. C. C. 404.*]

[Where a legacy is of "the value" of securities, &c. tho' the specification be varied, the legacy is not adeemed. *Pulsford v. Hunter, 3 Bro. C. C. 416.*]

[A legacy of a sum to be divided among children, all such as are born before the time of division take. *Ibid.*]

[Main-

[Maintenance not equivalent to interest for the purpose of vesting a legacy. 3 Bro. C. C. 416.]

[Testator having given to charities, legacies, and also a residue in bank-stock, and having no bank-stock at his decease, but having 3 per cent. annuities, which would satisfy the legacies in that shape, and leave a residue, but if sold would not purchase bank-stock to satisfy the legacies in that form; a decree taken by consent, that the legacies should be paid in 3 per cents. according to the sums given. *Finch v. Inglis*, 3 Bro. C. C. 421.]

[An infant not opposing, his legacy ordered to be paid in the same manner; but if the testator's property had been sufficient, the legacies should have been paid in bank-stock. *Ibid.*]

[Testatrix gives legacies to be paid within three months out of a bond-debt due to her; the obligor afterwards, in the lifetime of testatrix, paid the debt and took up the bond; the legacies are thereby adeemed. *Badrick v. Stevens*, 3 Bro. C. C. 431.]

[Where the period of division is marked out by the testator, only children in esse at that period can take; but where the gift is general, all the children shall take. *Hughes v. Hughes*, 3 Bro. C. C. 352. 434.]

[Testator leaves a residue in trust for four, with survivorship; two die; the survived shares shall survive, as well as the original shares. *Worlidge v. Churchill*, 3 Bro. C. C. 465.]

[A legacy to daughters equally to be divided between them when they arrive at 24 years of age, is vested immediately, and only the time of payment postponed. *May v. Wood*, 3 Bro. C. C. 471.]

[Where there is a charge in a will of legacies on a real estate, they shall be so charged, tho' they are first directed to be paid out of the residue of the personality, the personal fund proving deficient. *Minor v. Wicksteed*, 3 Bro. C. C. 627.]

[Gift by will of a specific sum among the six children of A.: A. had six children at the time; one more was born after the testator's will, but before the codicils; she shall not take a share with the six born before. *Sherer v. Bishop*, 4 Bro. C. C. 55.]

[The testator gave the residue to his relations named in the will; he made a codicil, which he directed to be taken as part of his will; and a second, by which he gave legacies, but gave no such direction; in this codicil there were legacies given to two of his relations; they shall take shares of the residue. *Ibid.*]

[Where a legacy depends on a contingency, the intermediate interest between the death of tenant for life, and the contingency happening, does not follow the principal, but falls into the residue. *Sharpe v. Cunliffe*, 4 Bro. C. C. 144.]

[Testator gives a residue to A. for life, remainder to B. for life, then to be divided among his (testator's) relations; this is a mere intestacy, and goes to the relations at the death of testator. *Masters v. Hooper*, 4 Bro. C. C. 207.]

[Tho' a gift of a legacy may release a debt, yet where the bond remains uncanceled, it must clearly express the intention so to do. *Wilmot v. Woodhouse*, 4 Bro. C. C. 227.]

[Legacies of new South-Sea annuities declared to be pecuniary, not specific; tho' the testator had more of that stock than sufficient

ficient to pay them. *Simmons v. Vallance, at the Rolls, 4 Bro. C. C. 345.*

[Child born after death of the testator decreed to take under a general gift to *A.* for life, then to the children of *A.*; but this point not contested. *Ibid.*]

[Devise of real and personal estate to trustees to pay, &c. to testator's wife for life, then to pay a legacy to his daughter; this is a vested legacy in the daughter, and transmissible. *Moleworth v. Moleworth, 4 Bro. C. C. 408.*]

[A citizen of *London* cannot (under the custom) devise land out of *London* in mortmain; and the residue of a mixed fund so given results to the heir at law and next of kin in proportions. *Middleton v. Cater, 4 Bro. C. C. 409.*]

[A residue to be divided by executors on an indefinite term vests at the death of the testator. *Stapleton v. Palmer, 4 Bro. C. C. 490.*]

[Testator gave all his plate and linen in his house in *S.* (with the lease) to his wife; he had but one set of plate and linen, which was usually removed with the family from house to house; the plate happened to be at *B.* the country-house, at his death, yet it passed to the wife. *Land v. Devaynes, 4 Bro. C. C. 537.*]

(3 Y 11.) When not.

But if a man by marriage-settlement, &c. has provided portions for his children, and afterwards, by his will gives to each of them the same sum, which was secured by the settlement; yet the portions shall not be doubled, if his intent that they should be so is not apparent. *R. 2 Vent. 348. 2 Ver. 111. 257. 439.*

So, if a man by settlement directs 3000*l.* to be paid to a daughter of his second marriage, if he has only one daughter; and afterwards by will devises all his lands, for the raising 9000*l.* for his three daughters, (having two by his former marriage); the daughter of the second marriage shall have only 3000*l.* to be paid according to the intent of the settlement. *R. 31 Car. 2. Per Finch, 2 Vent. 347.*

So, if a man charges 500*l.* upon his land for *A.*, and afterwards gives 500*l.* to *A.* by his will; *A.* shall not have a double portion. *1 Ch. R. 77. 2 Ver. 257.*

If a man by his will gives 1000*l.* to each daughter, and afterwards gives to one of them upon her marriage in his lifetime 1000*l.* she shall not have the other 1000*l.* by his devise. *2 Ver. 257. 115.*

[If a father makes his will, and gives his daughter who is married 50*l.* to be lent out for her, and she to have the use of it, and the husband afterwards receives it of the father, and gives a receipt for it, in lieu of her portion and of the legacy; this shall be a satisfaction of the legacy. *Scotton v. Scotton, M. 6 G. in Canc. Str. 235.*]

[If *A.* devises 300*l.* to his daughter, if she marries with her mother's consent, otherwise only 200*l.*; afterwards in his life she marries, and the father gives 200*l.* with her; this is a revocation of the devise so as to deprive her of the other 100*l.* *Anon. M. 7 G. Str. 407.*]

[If a father having six children gives *A., B., C., D.* 1500*l.* each

in his lifetime, and by will reciting this as to *A.*, *B.*, and *C.*, (omitting *D.*) gives 1500*l.* each to *D.*, *E.*, *F.*, and the residue to be divided amongst them; the money *D.* had received shall go in satisfaction of the legacy. *Upton v. Prince*, 8 G. 2. C. T. T. 71.]

[If husband before marriage, in consideration of considerable fortune, settles 100*l.* per ann. in trust for pin-money, two years whereof are in arrear; he makes his will leaving her 500*l.*, another year becomes in arrear, and he dies; the legacy shall be deemed in satisfaction of the arrears incurred before making the will, but not after. *Fowler v. Fowler*, P. 1735, 3 P. W. 353.]

If he limits a term for raising 3000*l.* portions for each of his daughters, after his death without issue male, and afterwards in his lifetime, having issue male, raises 1800*l.* for the portions of his daughters, and then his son dies; this 1800*l.* goes in part of the 3000*l.* to be raised by the term, tho' it was intended for portions at the time when he had a son. R. 2 Ver. 257.

[So, if by settlement, he secures 5000*l.* for daughters' portions at 18 or marriage, and afterwards by a subsequent settlement of other lands creates a term for raising 5000*l.* at 16 or marriage; it shall be only one 5000*l.* R. 2 Ver. 348.]

[If *A.* by a note agrees to pay 7*l.* 10*s.* per ann. to his wife for life, who had joined in the sale of part of her jointure, and afterwards, on her joining in the sale of another part, he gives another note for 6*l.* 10*s.* per ann. for her life, and afterwards devises 14*l.* per ann. to his wife for life; it shall be intended in lieu of the notes. R. 2 Ver. 498.]

So, if *A.* by articles agrees to give 800*l.* to his wife, and that she shall not be barred thereby of any gift by his will; and by will devises to his wife 1000*l.*, she shall have only so much as exceeds the 800*l.* R. 2 Ver. 555.

So, if he articles to give a third of his personal estate, and by his will gives to the same person 7000*l.*, he shall have only the one or the other. R. 2 Ver. 556.

If he devises 50*l.* to *A.*, and afterwards gives a note to her husband in lieu of it. 2 Ver. 646.

So, if *A.* agrees to give a marriage portion to *B.* to be settled, &c. and before payment gives to the children of *B.* legacies to the value, it shall be taken to be in satisfaction. R. Eq. R. 64.

So, if he covenants to settle 100*l.* per ann. upon his son, and permits 100*l.* per ann. to descend to him. 1 P. W. 325. 2 Ver. 558.

Or, covenants to leave 500*l.* to his wife; and her share of his personal estate amounts to so much. 1 P. W. 324.

If *A.* has a legacy of 500*l.* given by her grandfather, and afterwards her father upon her marriage gives for her portion 1500*l.* without mention of, or receipt for the legacy; 21 years afterwards she and her second husband demand the legacy; it shall be intended to be satisfied by the portion. R. 2 Ver. 484, 5.

Otherwise, if the portion was also devised by the father. Eq. R. 72.

[If *A.* selsed of freehold, and possessed of leasehold and personal, gives an annuity of 20*l.* to his daughter *H.* and the heirs of her body,

body, and if she dies without issue to his two sons *B.* and *C.* whom he makes executors; *C.* dies intestate leaving children, and *B.* by will gives an annuity of 20*l.* to his sister *H.* and her daughter out of his freehold houses, and if they die without issue, to his nephew; and by a codicil wrote with a pencil, and not executed according to the statute of frauds, says, it is not to be considered as another annuity, but only to confirm the annuity left by the father, *H.* shall not have both annuities. *Heather v. Rider*, *P.* 1758, 1 *Atkyns*, 425.]

[If *A.* on his daughter's marriage gives bond to leave 5000*l.* among her younger children, and by will creates a term in a real estate, to apply the rents to the maintenance of the children till of age, and gives his personal estate in trust to pay the produce to his daughter for life, and then to pay 1500*l.* to one child, and the 3500*l.* among the others as she should appoint, and declares the legacies in satisfaction of the bond, they must make their election under the will, or under the bond, and if under the bond, can have nothing under the will, tho' the trust of the term is of a real estate, and the bond a personal debt; because the devise is declared to be in satisfaction, otherwise not. *Graves v. Boyle*, *T.* 1739, 1 *Atkyns*, 509.]

[If a man assigns his personal estate to *A.* his natural daughter, but keeps the deed and manages his personal estate as before, then gives her a bond for 10,000*l.* then makes his will, and gives her his real estate if she marries *B.*, if not, to *B.* and makes her executrix and devisee of his personal estate, she shall not have all, but make her election. *Johnson v. Smith*, *M.* 1749, 1 *Ves.* 314]

[If a man agrees to settle 100*l.* *per ann.* on his intended wife, and finding himself ill, leaves her 1000*l.* *per ann.* by will, recovers, marries, and the settlement is carried into execution, she shall have but 100*l.*; not that one is a satisfaction for the other, but it is a completion of the act, and the settlement a corroboration of the will. *Masfal v. Masfal*, *M.* 1749, 1 *Ves.* 323.]

(3 Y 12.) When a legacy shall be controuled by a subsequent Clause or Provision, and when not.

[A devise in express words shall not be extended by subsequent general ones further than the natural meaning of the preceding ones. *Roberts v. Kuffin*, *M.* 1740, 2 *Atkyns*, 112.]

[If *A.* by his will gives to *B.* all his dividends on his *South-Sea* annuities, and then by codicil gives to *C.* 20*l.* *per ann.* for life, to be paid out of his *South Sea* annuities, it is not a revocation *in toto*, but both shall stand. *Stone v. Evans*, *M.* 1740, 2 *Atkyns*, 86.]

If a man devises a moiety of his personal estate to his wife, and then gives several legacies and the residue to another; the wife shall have one full moiety, and all the legacies shall be paid out of the other moiety, if it is sufficient. *R. Ca. Ch.* 16. *Dub. Dy.* 59. b.

[If a man devises 100*l.* *per ann.* to his son and his wife for their respective lives, 60*l.* of which should be paid to the wife for the support of herself and daughter, and 40*l.* to the son, and the son dies in testator's life, the whole 100*l.* shall be paid to the wife. *Cowper v. Scot*, *H.* 1731, 3 *P. W.* 119.]

[If *A.* by will gives 1000*l.* for the benefit of his daughter for life, then

then to such children as she should leave at her death, and her husband by will, to make good *A.*'s will, gives his wife 1000*l.*, and after her death equally to his two sons *B.* and *C.*, his daughter *D.* having released her right; *C.* surviving his mother, shall have the whole 1000*l.* *East v. Cook, M. 1750, 2 Ves. 30.*]

If a man gives 500*l.* to his daughter to be paid in six months after his death, and then adds a clause, that if his daughter dies before age, or marriage, the portion, if by law it can, shall go to his son; if the portion is paid in six months, and the daughter afterwards dies under age, it shall not be refunded; for both clauses ought to be consistent, which cannot be, unless she dies under age within the six months. *R. Ch. R. 27.*

If a man gives legacies to his children in esse, and also to the child whereof his wife was privement enseint, and if all his children die, that his estate shall go to the children of his brother; if all the children in esse die, but a daughter born after his death survives, the estate does not go to the children of the brother. *1 Ch. R. 77.*

But if *A.* devises portions to grandchildren, to be paid at age or marriage, and afterwards directs that all his legacies shall be paid within six months after his death; it extends to the other legacies only. *R. Eq. Ca. 154.*]

(3 Y 13.) When a Legacy shall be lapsed.

If a man devise money to *A.* who dies before the testator; the legacy is lapsed, and merges in the personal estate. *Vide Devise, ante, (3 A 3, &c.)—Vide Executor, ante, (3 G 7.)*

[If a legacy be given to be paid from a farm, when *A.*'s son shall attain 21; the farm not being carried on, the legacy falls, and shall not be paid out of the residue. *2 Brown, 125.*]

[If a man devises to six executors all his estate, to pay, &c. and the remainder to be equally divided between them, and one of the six dies before the testator, his share is a lapsed legacy, undisposed of, and goes to the next of kin. *Page v. Page, M. 2 G. 2. Str. 820.*]

[If a man makes his wife executrix, and devises the use of his personal estate to her for life, and after her death to his four brothers, share and share alike, and two of them die before him, the shares of the two so dead belong to the executrix, and not to the others as next of kin. *Man v. Man, P. 4 G. 2. Str. 905.*]

[If a man devises 200*l.* a-piece to his children, payable at 21, and if any of them die before 21, then his legacy to go to the surviving children; and one of them dies in the life of the testator, the legacy lapses as to the person dying, but is well given over to the survivors. *Willing v. Baine, T. 1731, 3 P. W. 113.*]

[If *A.* devises to *B.* his heirs, executors, &c. all her house and furniture, and all her real and personal estate, to the intent, that out of her real and personal estates her legatees may be paid, and gives to *C.* 2000*l.* in trust for the use of his daughter *D.* to be paid her at 18 or marriage, and till then to be laid out at interest, and the interest to be put out at interest, and directs the 2000*l.* to be paid to *C.* 18 months after testatrix's life, and *D.* six months after unmarried, the legacy is lapsed, tho' there are personal assets sufficient. *Van v. Clark, T. 1739, 1 Atkyns, 510.*]

So,

So, if he devise to *A.* upon condition that *A.* shall give so much to the children of *B.*, if *A.* dies before the testator, the whole is lapsed, and the children of *B.* take nothing. *R. 2 Ver. 116. 208. Semb. cont. 2 Ver. 522.*

[If *A.* devises the residue to his executrix or her heirs, &c. and she dies in his lifetime, he dies intestate as to the residue. *Stone v. Evans, M. 1740, 2 Atkyns, 86.*]

[If *A.* devises the surplus of his personal estate to *B.* and his heirs, and in default of issue at his death, to be equally divided between his sisters and their heirs; and *B.* dies in *A.*'s lifetime, leaving a son, as the contingency has not happened, the surplus does not go to the sisters, but as an undisposed part according to the statute of distributions. *Miller v. Faure, H. 1747, 1 Vesf. 85.*]

[If testator desires the residue may be divided between *A.* and *B.*, and *A.* dies in testator's lifetime, his moiety does not survive to *B.*, but is undisposed of, and shall go to the next of kin. *Peet v. Chapman, T. 1750, 1 Vesf. 542.*]

[If a man by will disposes of all his estate, gives legacies, and then the remainder in fifths, and appoints *A.* his heir to whatever is unappropriated, and one of the five residuary legatees is dead at making the will, his share goes to *A.* *Jackson v. Kelly, T. 1751, 2 Vesf. 285.*]

[If a woman has a power to appoint 4000*l.* to her kin, and for default to go according to the statute, and by will appoints to her nephew *A.*, he having an annuity to his mother, and *A.* dies in testatrix's life, the 4000*l.* lapses, but the annuity remains a charge on it. *Oak v. Heath, M. 1748, 1 Vesf. 135.*]

If a man devises to *A.* a debt owing to him by *A.* who dies before the testator, the debt shall not be discharged. *R. 2 Ver. 522.*

Tho' he afterwards requires his executor at his death to give a release for the debt; for this clause is ancillary to the former. *R. 2 Ver. 522.*

[Where a will directs a legacy to be paid when the party attains the age of 21, that is a vested legacy; but if the legacy is to be paid if the legatee attain the age of 21, it is not vested. *3 Term Rep. 43.*]

(3 Y 14.) When not.

But if 100*l.* is devised to *A.* at his age of 21, and if he dies before, that it shall go to *B.*, if *A.* dies in the lifetime of the testator, the 100*l.* shall go to *B.* *2 Ver. 208. 378. Per King, Ch. 5 G. 2. 12, 13.*

[If *A.* gives four-eighths of his personal estate to his niece *B.* and the children born of her body, and *B.* has then no child, but afterwards has *C.* and dies before testator, it is not a lapsed legacy; for *B.* did not take an estate-tail, (children being words of purchase, not limitation,) but as joint-tenant with *C.*, who, on her death, takes the whole by survivorship. *Buffar v. Bradford, M. 1741, 2 Atkyns, 220.*]

[If *A.* gives 500*l.* to his grandson *B.* if he lives to 21, if not, then to the other child or children of *C.* equally, arriving at such age, and dies, and *B.* dies before 21, and *C.* had no other children at *A.*'s death, but has two afterwards, these two are entitled to it at 21; for

for the testator must have had future children in view. *Haughton v. Harrison, T. 1742, 2 Atkyns, 329.*]

So, if a man devises 100*l.* to *A.* at the age of 21, 100*l.* to *B.* at the same age, and 100*l.* to *C.* at the said age; and if any of them die before such age, that his legacy shall be divided between the survivors; and if two die before, the whole shall go to the survivor: if any one dies before the testator, his legacy shall be divided between the survivors. *R. 2 Ver. 207.*

If one devises to *A.* 400*l.* which *A.* owes to him, provided that he pays out of it so much to his wife, and so much to his children; it will be a good devise to the wife and children, tho' *A.* dies in the lifetime of the testator. *R. 2 Ver. 522.*

So, if a man by his will discharges, releases, or forgives a debt due from *A.* it will be a discharge, tho' *A.* dies before the testator. *R. 2 Ver. 522.*

[If testator says, "I forgive my son-in-law *A.* a debt of 500*l.* due on bond, and desire my executor to deliver up the bond to be cancelled," and *A.* dies in testator's lifetime, yet the bond shall be cancelled. *Sibthorp v. Moxam, M. 1747, 3 Atkyns, 580, 1 Vesf. 49.*]

[If *A.* by will forgives her son-in-law a debt on bond, and orders it to be delivered up (not saying to whom) to be cancelled, and he dies in *A.*'s life, yet the bond shall be cancelled, for this shall be considered as a provision for her family. *Sibthorp v. Moxholme, M. 21 G. 2. 1 Wilf. 178.*]

[If a man devises his real estate to *A.* for life, then to *B.* he paying 100*l.* to *C.* in twelve months after *A.*'s death, and *C.* survives *A.* but one month, the legacy does not lapse, but goes to the representative of *C.* *Hodgson v. Rawson, M. 1747, 1 Vesf. 44.*]

So, in all cases where the legacy is not vested by the words of the will, it shall not lapse; as, if *A.* gives to the four children of *B.* 1200*l.* at the discretion and allotment of his executor, and one child dies before *A.* his share shall not lapse; for the executor had not made any allotment. *R. 2 Ver. 744.*

So, if the executor has power by the will within a year to make distribution or allotment, and one child dies within six months before a distribution; his share does not go to his executor or administrator, for it was not vested. *R. 2 Ver. 745.*

So, if a man devises 200*l.* a-piece to his two children, and that if one dies, his share shall go to the survivor; if one dies, his legacy does not lapse, but survives. *R. Eq. Ca. 137.*

[If *A.* give his grand-daughter 800*l.* to be paid at 21 or marriage, charged on a mixed fund of real and personal, and she dies unmarried before 21, it shall be paid out of the personal. *Basset v. Basset, M. 1744, 3 Atkyns, 203.*]

[If a man by will says, "I give the following legacies, and if any die before they are payable, I will that they shall not be deemed lapsed legacies," and then gives to *A.* the wife of *B.* her executors, &c. 50*l.* and *A.* dies in the life of testator, the legacy shall go to *B.* *Sibley v. Cooke, M. 1747, 3 Atkyns, 572.*]

[But the testator must nominate another legatee, or it would not exclude the heir at law or next of kin. *Ibid.*]

[If a testator give his whole estate to his executor, to pay the income to testator's mother, and after her death then some part of it

to A.; all the rest and residue to his executor, *with a power to dispose of, by will, the residuum he will be entitled to after the decease of the mother*: notwithstanding these last words the legacy is vested in A., and if he die in the mother's lifetime, his representatives shall have it. 2 *Brown*, 75.]

(3 Y 15.) When it merges in the Land.

If portions are charged upon land by settlement, or by devise, to be paid to a son or daughter at such an age, and the son or daughter dies before such age, the portion or legacy merges for the benefit of the heir. 2 *P. W.* (610.) 277. *Vide ante*, (3 Y 2. 8.)

So, if a legacy is charged upon land, it merges for the benefit of the devisee; for he is *heres factus*. *Vide* 2 *P. W.* (610.) 277. *Vide ante*, (3 Y 2.)

[If A. tenant for life, and B. his eldest son tenant in tail, re-settle estate to A. for life, to trustees for years, to raise 1100 *l.* to be paid to C. (A.'s second son) six years after A.'s death, with interest at 5 *l.* per cent. for his maintenance from A.'s death, remainder to B., &c. C. dies in debt, two years after him A. dies, and a good estate comes to B., yet the creditors cannot have the 1100 *l.* the contingency on which it was payable never happening; but it sinks for the benefit of the owner of the real estate. *Bradley v. Powell*, P. 9 G. 2. C. T. T. 193.]

[If A. devises to trustees all his lands in trust, to sell lands in M. to pay his debts, and as to the rest of the lands, to stand seised in trust to receive the rents and profits, and make leases for 99 years, determinable on three lives, and therewith pay all his debts and legacies, and then stand seised to the use of B. for life, remainder to her issue, and gives a legacy of 500 *l.* to T. to be paid at 21 or marriage, and T. dies unmarried before 21, and testator's personal estate and lands in M. are not sufficient to pay debts; as, the 500 *l.* is charged on real as well as personal estate, it cannot be raised, legatee having died before the time of payment. *Prowse v. Abington*, P. 1738, 1 *Atkyns*, 482.]

[If 8000 *l.* is given to trustees, to lay out in lands to be settled to the use of A. and the heirs of his body, and for default to be conveyed to B. on trust, in three months, by mortgage or sale, to raise and pay 2000 *l.* to C. which is bequeathed to him in case A. dies without issue, and by codicil the 6000 *l.* given to B. is reduced to 5000 *l.* and C. dies, then A. dies under 21, and without issue; the 2000 *l.* shall sink in favour of the heir at law. *Attorney-General v. Milner*, T. 1744, 3 *Atkyns*, 112.]

So, if it is charged upon land and personal estate, and the legatee dies before it is payable; his executor or administrator may resort to the personal estate, but not to the land. 2 *P. W.* (611.) [*Pearce v. Loman*, 3 *Ves. jun.* 135.]

Tho' the legatee be a child or a stranger. 2 *P. W.* (613.)

[If A. devises 1500 *l.* to his son, payable at his age of 24, and devises his real estate to trustees, to raise sufficient to discharge his debts and legacies, if his personal estate should fall short, the death of the son before 24 shall not extinguish it; for it is an absolute legacy out of the personal estate, and the real estate is only in aid of the personal. *Harrison v. Buckle*, M. 6 G. Str. 238.]

[If

[If a man devises to *M.* his daughter 2500*l.* at age or marriage, and if *C.* his son die without issue-male, then *M.* to have at 21 or marriage 3500*l.* more, and if the son's so dying do not happen before *M.*'s age or marriage, then she is to receive it whenever after it may happen; then devises his real estate to *C.* his son in tail-male, remainder to his brother in fee, and declares the land devised liable to that payment whenever it becomes due, and directs, that on failure of issue of *C.*, *M.*, her heirs or assigns, shall join in a surrender of some copyhold to the use of his brother, or the 3500*l.* legacy to be void. *M.* attains 21, marries, dies in *C.*'s lifetime, her husband administers, and then *C.* dies without issue; the 3500*l.* shall not sink in the land, but be raised for administration if personal estate deficient. *King v. Withers*, T. 9 G. 2. C. T. T. 117. affirmed by the lords, with costs, 16th March 1735, 3 P. W. 414.]

[If *A.* devise lands to *T.* his second son, on condition that he or his heirs pay his six grandchildren, *T.*'s children, 90*l.*, in default of payment a clause of entry and distress, and *T.* dies in *A.*'s life, whose heir at law enters on them, and sells them; yet the 90*l.* is a continuing charge on the lands in the hands of the purchaser, and the children shall have it with interest. *Wigg v. Wigg*, T. 1739, 1 Atkyns, 382.]

[If a man devises copyhold lands (surrendered to the use, &c.) to his wife for life, then to his son till his grandson attain 23; then to his grandson, his heirs and assigns, on condition that he or they pay his grand-daughter *E.* 60*l.* in two years after he attains 23; if he dies without issue, then to his (testator's) son, on condition of paying 100*l.* to *E.* in one year after he enjoys under this last devise, and if grandson or son make default in payment, then a power to *E.* his executors and administrators, to enter and receive till paid; *E.* marries and dies after the grandson has attained 23, but in less than two years after it; the 60*l.* shall be raised, and paid to her representative. *Emes v. Hancock*, H. 1742, 2 Atkyns, 507.]

[If a man gives to each of his daughters *A.* and *B.* 300*l.* to be paid by his son and executor *C.* when he attains 26; but as they are otherwise provided for, directs they shall not have interest till then; and for the better securing the said two sums, charges them on land, with power to enter and hold till payment; the personal estate is insufficient, and *C.* dies before he attains 26; but as the legacies are vested, and the time of payment is postponed, for the convenience of the estate, not on the circumstances attending the legatees, they shall not sink in the land, but be paid. *Sherman v. Collins*, H. 1745, 3 Atkyns, 319.]

(3 Y 16.) When it shall have Relation to the Time of making the Will.

In the exposition or collection of the intent of a testator, regard shall be had to the time of making the will; and therefore if he devises 10*l.* to the parish where he lives, and afterwards he removes his habitation to another parish; the parish where he lived at the time of the will shall have the legacy.

If he devises 400*l.* to finish a building, and before his death expends more than that sum upon it; tho' the building be not finished, the heir shall not have the 400*l.* R. 1 Ver. 96.

If he devises to *all his children and grandchildren*, without any reference to his death or time future; it shall have effect only as to those *in esse* at the time of his will. *R. Eq. Ca. 136.*

If he devises *all arrears now due* from the dean and chapter of *York*; rent which afterwards becomes due does not pass. *R. Eq. Abr. 201.*

All my corn, sheep, &c. now on my ground. *P. W. 598.*

[If a man makes a devise to charitable uses before a statute of mortmain, but does not die till after it, yet the devise is good in law. *R. by all the judges. Ashburnham v. Bradshaw, P. 1740, 2 Atkyns, 36.*]

(3 Y 17.) Or, to the Death of the Testator.

But where a devise is made in words, general or universal, the reference shall be to the death of the testator; as, if a man devises *20 l. a-piece to all the children of B.* issue born after the making of the will, before the death of the testator, shall take. *R. 2 Ver. 105.*

If a man devises *all his personal estate to A.*, he shall have all that the testator had at the time of his death, tho' increased since the making of the will. *2 Ver. 137. 688.*

So, if the testator releases to *A.* by his will, *all debts and demands*; this extends to debts at the time of his death, tho' contracted since the making of the will. *Dub. 2 Ver. 136, 7.*

So, if he gives *all his household goods*, and afterwards has more. *P. W. 424, 5.*

If he gives *all his books*, and afterwards buys more. *P. W. 597.*

So, if the devise is of such a sum *to his children living at his death*, and of such a sum *to the children of D.*, all the children of *D.* shall take, tho' none born at the time of making of the will, or death of the testator. *2 Ver. 705.*

[Bequest to two grandsons and a grand-daughter of the testatrix equally, payable at 21, or marriage of the last; if she dies before the time of payment, her share to go to the grandsons equally; and in case of the death of either, the whole to the survivor; and if either grandson dies under 21, his share to go to the surviving grandson; and if all three die before the time of payment, the whole to go over: both grandsons died under 21; the grand-daughter attained 21: she was held entitled to one third; and the personal representative of the surviving grandson to the other two. *Mackell v. Winter, at the Rolls, 3 Ves. jun. 236.*]

[Reversed on appeal by the Lord Chancellor, who held, that the vesting of the legacies was postponed to the time of payment, and a limitation over in the nature of a cross-remainder implied from the general intention. *3 Ves. jun. 536.*]

So, a variation of circumstances, after a will made, and before the death of the testator, does not destroy a legacy; as, if a man devises a legacy *out of money at interest*, or *owing by such a one*, &c. if the money is afterwards paid to the testator, the legacy will be good. *R. Ray. 335.*

If he devises a sum to *A.*, and *to be paid out of a debt from the king*; tho' the debt fails, yet the legacy shall be paid; for it was so much devised generally, and the clause how it shall be paid, was only a direction for the better payment. *R. 2 Ca. Ch. 116.*

If he devises 500*l.* to his uncle, viz. the bond and judgment for 400*l.* due from A. and 100*l.* in money; if the testator receives from A. 300*l.*, and takes a note for the residue of the debt, the uncle shall have 500*l.* 2 *Ver.* 681.

[Yet, if a man having 2702*l.* 3*s.* bank stock, and 2000*l.* India, devises them to his daughters, to be divided, and before his death sells 702*l.* 3*s.* of the bank, it is an *ademption pro tanto*. *Jeffreys v. Jeffreys*, T. 16 G. 2. 3 *Atkyns*, 120.]

[If a debt is devised, and the testator afterwards receives it, it is an *ademption* of the legacy; but if a sum is devised payable out of a debt, testator's receiving the debt is not an *ademption* of the legacy. *Ford v. Fleming*, H. 2 G. 2. *Str.* 823.]

So, if the devise is positive and direct of a sum out of such a debt, and the debt fails, the legacy is lost. *Semb.* 2 *Ca. Ch.* 116.

[Testator gave the interest of a bill of exchange on the *East India* company to his wife for life, and directed, that after her death the bill should be sold, and the money divided among certain persons, with survivorship, in case of the death of any in her lifetime. It constituted the bulk of his property, and was paid before his death; held to be no *ademption* of the legacy. *Coleman v. Coleman*, 2 *Vesf. jun.* 639.]

[Legacy to A. for life, and to her children at her decease, would generally be held to vest in all the children, as they come *in esse*; but on circumstances, it was held vested in those only who were living at the death of their mother. *Spencer v. Bullock*, at the *Rolls*, 2 *Vesf. jun.* 687.]

(3 Y 18.) When Legatees shall abate.

If there are not assets to discharge all the legacies, the legatees shall abate in proportion. 2 *Ca. Ch.* 171. 124. *Ca. Ch.* 149.

And also the specific legatees shall abate in proportion. *Semb.* *Ca. Ch.* 171. *Cont.* 1 *P. W.* 422. 1 *Ver.* 31. *Vide* (3 Y 19.)

[If a man charges all his real and personal with payment of debts, a specific devise is subject to it, if the residue is not sufficient. *Clark v. Sewell*, T. 1744, 3 *Atkyns*, 96.]

So, if the executor gives a statute, mortgage, or other security to one legatee, and afterwards becomes insolvent, whereby the other legacies are not paid; the legatee who has the security shall abate in proportion. *R. Ca. Ch.* 149.

Tho' such security was given upon the marriage of the legatee. *Ca. Ch.* 149.

So, if lands, &c. are devised to be sold for payment of legacies, and are not sufficient for all; the legatees shall abate in proportion. 2 *Ca. Ch.* 25.

So, if a testator devises that his executor shall assign 100*l.* *per ann.* in land to A. and his heirs, 200*l.* to B. and 300*l.* to C., and after the 100*l.* *per ann.* is assigned, the other lands are not sufficient for the other legacies; A. shall abate in proportion. *R.* 2 *Ca. Ch.* 25.

So, a legatee shall abate in proportion, tho' his legacy is given to be paid in the first place. 1 *Ver.* 31.

Tho' he is executor, and it was given him for his trouble. 2 *Ver.* 434. 2 *P. W.* 25. *Heron v. Heron*, P. 1741, 2 *Atkyns*, 171.

[Appointing a legacy to be paid at a sooner time does not give it a priority; but in case of deficiency, it must abate in proportion. *Clark v. Sewell*, T. 1744, 3 *Atkyns*, 96.]

[If *A.* gives his wife a general legacy to be paid immediately after his death out of the first money got in, and that she shall be entitled to said legacy in bar of dower and thirds; if she is not entitled to dower she shall abate; but if entitled; she shall not abate. *Blower v. Morret*, T. 1752, 2 *Ves.* 426. *Vide Ambler*, 244, 245.]

[If *A.* having a mortgage for 500*l.*, and no other sum out at interest, devises to *B.* 500*l.* to remain at interest on such securities as he should leave, or to be put out on government securities; this is not a specific legacy, and *B.* shall abate in proportion. *Lawson v. Stich*, P. 1738, 1 *Atkyns*, 507.]

[A devisee of an annuity for life charged on personal estate shall abate in proportion with other legatees. *Halton v. Medlicot*. *Hume v. Edwards*, P. 1749, 3 *Atkyns*, 693.]

(3 Y 19.) When not.

But if a particular chattel is devised *in specie*, the legatee shall have it entire, and not abate in proportion to the other legatees. 1 *Ver.* 31. 2 *Ver.* 11. *Eq. R.* 87.

[Yet, jewels devised as a specific legacy shall be applied to pay simple contract debts, if the rest of the personal falls short, in case of the real estate. *Clarke v. Clarke*, in *Sc. M.* 1721, *Bunb.* 90.]

[If there are specific legacies, and money legacies, and not assets sufficient besides to pay debts, there shall not be a proportionable deduction, but the money legacies shall be applied first. *Cotterell v. Chamberlain*, in *Sc. H.* 1718, *Bunb.* 32.]

[If there is a specific devise of land, the devisee shall not contribute with the heir at law to satisfy creditors, if the real assets of the heir are sufficient. *Palmer v. Mason*, M. 1737, 1 *Atkyns*, 505.]

If a legacy is given to a charity, and the spiritual court prefers it, as it ought by the civil law; equity will not grant an injunction, or oblige the legatee to give security to refund. 1 *Ver.* 230.

If *A.* devises that his executor shall receive his debt of 8000*l.* from the chamber of London, and then he shall pay 2000*l.* to an hospital; tho' the debt in the chamber of London is reduced to 6000*l.* the executor shall pay 2000*l.* to the hospital. R. 2 *Ver.* 547.

[Legacies of stock are specific or not, according as the intent of testator appears from the will and circumstances, that he intended to confine it to the stock he then had, or not. *Avelyn v. Ward*, H. 1749, 1 *Ves.* 420.]

[If testator has *South Sea* stock at making his will, and at his death sufficient to answer a devise of it, it is a specific legacy, and shall not abate. *Ibid.*]

If *A.* devises his personal estate in W. to *B.* and also devises 300*l.* to another to be paid out of his personal estate, generally; if he has sufficient personal estate elsewhere to pay the 300*l.* *B.* shall not abate. R. *Eq. R.* 87.

[If *A.* having wife and two children, and by will gives his wife (otherwise unprovided) 120*l.* per annum for life, limitation over to a son, and directs executors to purchase it in long annuities, or if they cannot,

cannot, to purchase lands of 200 *l. per annum*, to pay the wife's annuity clear, with remainders over; executors to pay 30 *l. per annum* out of profits of residue to wife for maintenance of child; gives other legacies, and the residue to be put out for children's advantages; the wife on deficiency of assets shall not abate. *Lewin v. Lewin*, T. 1752, 2 *Ves.* 415.]

Yet a specific legatee shall abate in proportion, where there is no fund to pay the legacy, but out of the specific legacies; as, if a man devises his personal estate in *W.* to *A.* and his personal estate in *H.* to *B.* and then devises 300 *l.* to *C.*, but has no personal estate, except in *H.* and *W.*, there shall be an abatement by *A.* and *B.* in proportion. *Eq. R.* 87, 8.

So, in such case, a legacy for a charity shall abate in proportion, if it is not to the poor at the funeral. 2 *P. W.* 25. 1 *P. W.* 422.

What shall be an assent to a legacy, *vide in Administration*, (C 6, 7.) *Vide ante*, (3 *G.* 4.)

When legatees shall refund, *vide ante*, (3 *G.* 3.)

Who shall be residuary legatee, *vide ante*, (3 *G.* 7.)

Lien. *Vide Assets*, (2 *G.* 2.) — *Bankrupts*, (2 *L.* 1. & *A.* 30.)

[Testator gave the residue of his personal estate to his executors for their own use and benefit, and afterwards by a codicil he directed them to dispose of the same in charities; and part was accordingly applied to the founding of a school. Thirty-five years after the testator's death, all the next of kin, and the acting trustee being dead, a bill was filed by the representative of the next of kin for the part of the personal property secured by mortgage, and therefore as to that, that the charitable bequest was void, praying an account of the personal property, and that the said bequest of the money out upon mortgage should be declared void, and should result to the next of kin: held by M. R. that the next of kin could not recal what had been laid out; that the length of time alone was not sufficient to raise a presumption that they knew their right, and released or acquiesced in the bequest; therefore an account was decreed, but with special inquiry into all the circumstances, and whether the next of kin had released, assigned, or in any manner given up their right. *Pickering v. Lord Stamford*, 2 *Ves. jun.* 272. 4 *Bro. C. C.* 214. *S. C.*]

[Length of time may bar in equity; 20 years possession bars an equity of redemption; but no time can cover a fraud. 2 *Ves. jun.* 280.]

[After 35 years a legacy may be barred on presumption of satisfaction. *Semb. ibid.*]

[On the report, the special circumstances affording no presumption of a release, an issue being declined, the accounts being clear, the trustees not being called on to refund what had been applied, and the widow being barred by the will, or her right of election having become impracticable, so much of the personal residue bequeathed to the charity as was secured on mortgage, was, notwithstanding the length of time, decreed by M. R. to the next of kin, with interest from the filing of the bill. *Ibid.* 581.]

[On a re-hearing his honour reversed that part of his decree whereby he declared such part of the residue to be divisible among the next of kin, in exclusion of the widow, and decreed it to be divisible accord-

ing to the statute of distributions, viz. one half to the widow, and the other to the next of kin. 3 *Ves. jun.* 332. On appeal to Lord Chancellor, his honour's decree affirmed. *Ibid.* 492.]

[No relief in equity after gross laches; as, where a creditor, seven years after coming of age, filed a bill to obtain the benefit of a decree to account, and after answer took no step in the cause for 33 years, and then filed another bill against residuary legatees of a party of the distribution of whose assets he had notice, as well as against other representatives; the bill was dismissed, altho' the question of satisfaction were doubtful. *Hercy v. Dinwoody*, 2 *Ves. jun.* 87. 4 *Bro. C. C.* 257. *S. C.*]

[The statute of limitations cannot be pleaded to a legacy. 2 *Ves. jun.* 572.]

[Nor, to an annuity; for there is no time from which it can run. *Semb. ibid.*]

[Laches does not apply to a large body of creditors. *Whichcote v. Laurence*, 3 *Ves. jun.* 740.]

[Every fair presumption to be made against a stale demand. 2 *Ves. jun.* 583.]

[Legatee having been abroad 26 years, and not having been heard of for 25 years, presumed to be dead. *Dixon v. Dixon*, at the Rolls, 3 *Bro. C. C.* 510.]

[Demurrer to a bill charging fraud in a misrepresentation of the value of an estate to the vendor, on the ground that the transaction was 27 years old, and had been confirmed by a deed 23 years since: disallowed. *Earl of Deloraine v. Browne*, 3 *Bro. C. C.* 633.]

[Account of rent of an estate held of trustees; the statute of limitations being insisted on: only ordered for six years before the bill filed. *Hercy v. Ballard*, 4 *Bro. C. C.* 468.]

[On a bankruptcy by lying two months in prison, no possible lien can be acquired after the first arrest. *Ex parte Lee*, 2 *Ves. jun.* 286.]

[An equitable lien is an equitable obligation to do according to conscience, and a devise of it is good in equity. 1 *Ves. jun.* 255.]

[Where an author agrees with a bookseller to publish his work, and to allow him interest for the money he shall advance, and also a share of the profits, the bookseller has a lien on the copyright for his disbursements. *Semb. Brook v. Wentworth*, 3 *Anst.* 881.]

[Bankers having securities deposited as a pledge for 1000 *l.*, tho' the depositor at his death being indebted to them in a larger sum, have no lien further than the 1000 *l.* *Vanderzee v. Willis*, 3 *Bro. C. C.* 21.]

[Order to pay money out of a particular fund, gives the party a specific lien thereon. *Smith v. Everett*, 4 *Bro. C. C.* 64.]

[Court will retain monies decreed to parties on the application of persons having claims upon them. *Duke of Bolton v. Williams*, 4 *Bro. C. C.* 430.]

(3 Z) Marriage Settlement.

(3 Z 1.) When it shall be enforced.

IF a man enters into articles to make a marriage settlement, and dies, his heir shall be compelled to make it. *R. 2 Vent. 343.*

Tho' the articles are made before marriage, to the woman herself, and the marriage is a release in law of the contract. *R. 2 Vent. 343.*

[So, if tenant for life, with power to make jointure, covenants before marriage to settle, and dies before settlement executed, the remainder-man shall perfect it. *Lady Coventry v. Lord Coventry, T. 10 G. Str. 596.*]

So, if a man covenants to make a settlement upon the marriage of his daughter; he shall be compelled to make it, tho' his daughter, after the marriage, dies before the settlement is made.

So, if a man gives a bond to make a jointure, he shall be compelled to make it, and not to forfeit his bond. *2 Ca. Ch. 88.*

So, if a man gives a bond to settle 300*l. per ann.* jointure, and dies, his heir shall be compelled to do it. *Ibid. 89, &c.*

So, his devisee, tho' no particular land is charged. *Ibid.*

So, if a man covenants by articles to make a settlement of 400*l. per ann.* for a jointure, and afterwards makes a settlement, but the land is only of 300*l. per ann.* value; he shall be decreed to settle so much *in specie* as would have made 400*l. per ann.* at the time of making of the settlement. *R. 1 Ver. 217, 8.*

If the covenant is to settle lands *which shall continue of 400 l. per ann.* value, he shall make a settlement of so much as now are of that value. *1 Ver. 218.*

If a man covenants to make a jointure out of his estate; all his lands are bound to it. *1 Ver. 64. 2 Ver. 482.*

Otherwise, if he covenants for particular lands, and that such lands are of so much value. *1 Ver. 64. Ch. R. 148.*

If a man recites a marriage to be intended between A. and his daughter, and if his daughter after the age of 16 refuses to marry A., A. shall have 20,000*l.*, and if the marriage is had after her age of 16, A. shall have all his real and personal estate: the marriage is had before she is 16, and after that age the daughter dies without issue; A. shall have all the real and personal estate. *R. 1 Ver. 339.*

If a man upon marriage covenants to make a settlement for a jointure, and dies before it is made, or the portion paid; the wife shall compel the settlement, tho' she is executrix or administratrix, where-by she has the portion also. *Semb. cont. but Qu. 1 Ver. 463.*

[When a wife sues her husband that he may settle lands for her jointure, pursuant to articles, and perform these articles; it is no bar that she has eloped with an adulterer, much less if it is not put in issue in the cause. *Sidney v. Sidney, P. 1734, 3 P. W. 269.*]

If a man upon the marriage of his son agrees to make a settlement in such a manner; it shall be decreed, tho' by the consent of the son he afterwards makes a settlement different, and that is confirmed by a fine. *1 Ch. R. 192. 2 Ver. 702.*

[If a father gets a son to execute a deed *secretly*, charging himself the

the same morning his marriage agreement is executed, it shall be set aside, as being in fraud of the marriage agreement. *Martins v. Bennett, H. 1733, Bunb. 336.*]

So, it shall be decreed against an heir, tho' the covenant was only for him, his executors, and administrators. *R. 2 Ver. 482.*

If *A.* covenants to make a settlement *to the use of himself and his wife, and the heirs male of their bodies, remainder to the heirs female, &c.* and dies before the settlement made, having a son and daughter, and the son covenants to levy a fine for the payment of debts, and dies without issue before the fine levied: the settlement shall be decreed to the daughter pursuant to the intent of the articles. *R. 2 Ver. 704.*

[If a settlement is executed after marriage to husband for life, wife for life, and the heirs of the body of husband by wife, the court will carry it into execution strictly, if made in pursuance of articles previous to marriage, otherwise not. *Glanville v. Payne, P. 1740, 2 Atkyns, 39.*]

[If a settlement after marriage gives issue an equivalent for what they were entitled to by settlement previous to marriage, the court will carry it into execution, otherwise not. *Ibid.*]

[A limitation in marriage articles to husband for life, to wife for life, to the issue of their two bodies, will not entitle the husband to dispose as he pleases, but shall be carried into strict settlement. *Villiers v. Villiers, M. 1740, 2 Atkyns, 71.*]

[So, if a man upon the marriage of his brother agrees for the settlement of his land *upon his brother, if he himself dies without issue*, and the wife of the brother has 180 *l.* for her portion, the devisee of the land (the devisor being dead without issue, and the portion being 180 *l.*) shall be compelled to perform the agreement, tho' it was to make an estate after an entail. *R. 2 Vent. 354.*]

So, if a trustee signs a deed, to testify his assent, whereby it is agreed that the land shall be settled to the use of a wife for jointure; tho' the land was subject to the payment of a debt due to the trustee, yet the jointure shall be settled prior to the debt. *R. 2 Ca. Ch. 211.*

So, if the settlement is *for a portion to be paid at full age, or marriage with the consent of her father, and if she dies before such marriage or age, that it shall be paid to another*; if the daughter has the consent of her father for a treaty upon her marriage, and he does not afterwards disagree, tho' the marriage was clandestine, without the privity of the father, the portion shall be paid. *1 Ch. R. 3.*

[If on marriage two fathers agree to settle certain lands; one does so, the other gives bond to do it; he has not his election to settle or forfeit, but must settle the lands, which was the original agreement. *Chilliner v. Chilliner, T. 1754, 2 Ves. 528.*]

So, if *A.* by letter proposes a settlement upon a treaty of marriage for his nephew, if 2500 *l.* portion is given, and the marriage proceeds and such portion is given, the settlement shall be decreed, tho' no answer was sent to the letter, nor the marriage had with the privity of the uncle. *Ch. R. 147.*

Or, by letter to a friend of *B.* proposes 1500 *l.* portion with his daughter, and the marriage takes effect, tho' no agreement was made directly upon such letter. *2 Ch. R. 285.*

If a settlement is made *in consideration of 500 l. in money and goods*;
after

after 15 years, it shall be decreed, without inquiry, whether the husband had the 500 l. 2 *P.W.* (618.)

But if a marriage settlement is made before marriage, all precedent agreements shall be intended to be extinct. *Semb. 1 Ver.* 369.

If a settlement is alleged to be contrary to an agreement, and a trial is directed to try what was the agreement; the settlement ought to be admitted for proof of the agreement. *R. per North, and a decree to the contrary per Lord Nottingham reversed. 1 Ver.* 246.

Yet where the settlement varies from the articles, without an intent apparent, it shall be decreed to be made conformable to the articles, tho' the settlement was before marriage. *R. 2 Ver.* 659.

[A settlement after marriage on an infant, and no settlement before, and no proof of the husband's being in debt, is good. *Middlecombe v. Marlow, H. 1742, 2 Atkyns, 519.*]

[If a settlement is just in general, the court will not weigh nicely the particular advantage on either side. *Ibid.*]

[An infant is bound by a settlement made on her marriage, where it is made with approbation of parents and guardians. *Hervy v. Ashby, P. 1748, 3 Atkyns, 607.*]

[Marriage agreements cannot be set aside, because it would affect the interest of third persons, *the issue. Ibid.*]

[Other agreements are entire, and if either party fails in performance in part, it cannot be decreed in specie, but must be left to an action; in marriage agreements it is otherwise; and if the relations of either party fail in performance, the children may compel performance; thus, if wife's father agrees to give a portion, and husband's father to make a settlement, tho' the portion is not paid, the children may compel the settlement. *Ibid.*]

[Tho' a father or guardian should act fraudulently, the marriage agreement shall not be set aside, but the delinquent, father, guardian, or husband, decreed to make satisfaction. *Ibid.*]

[Marriage settlement not altered in favour of the probable intention, the recital being too general, and nothing *dehors* the clause to do it by. *Doran v. Ross, 1 Ves. jun. 57. 3 Bro. Ch. Ca. 27. S. C. See also 1 Ves. jun. 362.*]

[Settlement reformed according to the intention declared in the recital. *1 Ves. jun. 171. See also Woodcock v. Duke of Dorset, 3 Bro. C. C. 569.*]

[Settlement, after marriage, of the wife's property, reciting, and in pursuance of a parol agreement before, in trust as to part of the produce to the separate use of the wife, as to the rest for the husband for life, then for wife for life, then among the children according to the appointment of survivor, held good against the creditors of the husband. *Dundas v. Dutens, 1 Ves. jun. 196.*]

[Refusal after marriage to perform a previous agreement to settle, is a fraud against which equity will relieve. *Semb. ibid. 199.*]

[*A.* tenant for life, remainder to his sons successively in tail male, remainder to *B.* for life, and to her sons in the same manner, with trustees to preserve contingent remainders. *A.* being also seised of the reversion in fee, cut and sold timber before the birth of a tenant in tail; afterwards *B.* had a son, who died soon after his birth, and another son, who survived *A.* The produce of the timber was decreed to be laid out in the funds during the life of *A.*, and on his death, with-

out

out having had a son, was decreed to be laid out in land to be settled to the uses of the estate on which the timber was cut. *Powlett v. the Duchesse of Bolton*, 3 *Ves. jun.* 374.]

[Covenant in a marriage settlement to settle leasehold estates in trust for such persons, and such or the like estates, ends, intents, and purposes, as far as the law would allow, as declared concerning real estates limited to the first and other sons in tail male, with several remainders: the court in executing the covenant, declared, that no person should be entitled to the absolute property, unless he should attain 21, or die under that age leaving issue male. *Duke of Newcastle v. Countess of Lincoln*, 3 *Ves. jun.* 387.]

[Settlement on marriage, of the wife's property only, on certain trusts for the husband, wife, and children, in one event for the husband absolutely; but making no provision for the event which happened: a resulting trust for the wife. *Langham v. Henny*, at the Rolls, 3 *Ves. jun.* 467.]

(3 Z 2.) When not.

But by the *stat. 29 Car. 2. 3.* no action shall be brought to charge a defendant on an agreement on consideration of marriage, unless that, or some note of it be in writing, signed by the party, or some authorized by him.

A letter is a sufficient note to shew an agreement to give a marriage portion. *R. 2 Vent.* 361. *Vide ante*, (2 C 4.)

But if *A.* by letter promises 1000 *l.* to his niece in marriage, yet by the same letter dissuades her from a marriage with *B.*, and she afterwards marries *B.* with the consent of *A.*, the money shall not be decreed. *R. 2 Ver.* 202.

If a marriage is agreed upon between the fathers of a son and a daughter, and minutes are taken of it by counsel, and before the writings are fixed, one of the fathers dies, the settlement shall not be decreed, not being signed by either party, and before the execution of the deeds many variations in the minutes might have happened. *Eq. Abr.* 21.

[If a mother at the marriage tells the husband, "My estate will come between my daughters," and afterwards gives directions to an attorney to prepare a settlement of part to husband and wife, and the right heirs of the husband, but both die before it is completed; the settlement shall not be carried into execution in favour of husband's brother and heir. *Brownsmith v. Gilborne*, *H. 13 G. Str.* 738.]

[If a man, having an estate in possession, and a leasehold, and being entitled to an estate-tail after his mother's jointure determined, by marriage articles settles part of his wife's portion on her and the issue, and the leasehold in her for life in bar of dower, and then covenants on his mother's death to settle 100 *l.* per annum for every 1000 *l.* on her for life, then on the issue, and he dies without issue in the mother's lifetime; the heir shall not be compelled to perform. *Whitmel v. Farrel*, *T. 1749*, 1 *Ves.* 256.]

And if articles with the wife before marriage provide that she shall dispose of the profits of her estate during the coverture, which is vested in a trustee for that intent, and after marriage the trustee, with the approbation of the wife, pays the profits to the husband; he shall not account

account to the wife for the profits not disposed of according to the agreement: for by law the articles are destroyed by the marriage. *R. Ca. Ch. 21.*

So, if *A.* upon the marriage of his daughter agrees that his manor shall be charged with 4000 *l.* for her portion, provided that if the husband does not settle a jointure answerable to it within two years, he shall have only interest at the rate of 3 *l.* per cent. for his life, and the manor shall be to the daughter and the heirs of her body; the wife dies within the two years before any settlement made; the husband shall not have the portion, or the manor, but only for his life. *R. 1 Ver. 68.*

So, if the portion was to be paid if the husband settled a jointure within three years, and the wife dies within the three years, before the jointure settled; the husband shall not have the portion. *1 Ver. 69.*

[If *A.* on marriage of his eldest son *B.*, in consideration thereof, and of portion, settles his estate to himself for life, to trustees for 200 years, to *B.*, and the heirs male of him and his wife, with remainders over, the trust to raise 1500 *l.* by profits or fines, and to pay 500 *l.* in six months, and 1000 *l.* in twelve months after *A.*'s death, as he should appoint; if none, void; and *A.* has another son *C.* to whom he afterwards gives 3000 *l.*, which *C.* lays out in lands; and *A.* by will directs 600 *l.*, part of the 1500 *l.*, to be paid to *C.* on his settling the lands purchased on the heirs-male of his body, and in default, on the right heirs of *A.*: *A.* dies; the 600 *l.* is paid *C.*, who gives receipts for it as the legacy in his father's will; *C.* marries, has issue male and female; the male exists many years, then fails; *C.* dies, *B.* dies; the son of *B.* cannot have this settlement carried into execution against the co-heirs of *C.*, when it is impossible to bar the remainder to him, (the son of *B.*,) nor shall he have the 600 *l.* repaid. *Parker v. Philips, T. 1750, 1 Ves. 530.*]

So, if a father agrees to give 3000 *l.* with his daughter; but by his will gives her only 2000 *l.*, and dies before the marriage, and the husband accept the legacy, he cannot afterwards demand 1000 *l.* more. For his equity is to have 3000 *l.* or nothing. *Mo. Ca. in Eq. 3.*

[If tenant for life, with power to jointure 400 *l.* a-year, on marriage articles, covenant to convey lands in a certain place of 400 *l.* a year, clear of taxes, and after the marriage make a settlement, reciting the power and the articles, and convey certain farms, which are expressed to be of the yearly value of 401 *l.*, and a pension of 4 *l.* a year, deducting 12 *l.* a-year for boots to tenants, and covenant that if it should be less than 400 *l.* to make good the deficiency; it shall not be made 400 *l.* clear of taxes; for the articles were made with reference to the power, and it was a mistake in them that the power extended to 400 *l.* a-year, clear of taxes. *Ambler, 424.*]

[But the value of the jointure is to be taken at the death of the husband. *Id. ibid.*]

[Settlement after marriage of stock standing in the name of the wife, the husband being insolvent, and soon after a bankrupt, set aside on the bill of the assignees after the death of the husband; and it was held, that the stock did not survive, but belonged to the assignees, subject to a provision for the widow. *Pringle v. Hodgson, 3 Ves. jun. 617.*]

[By the settlement made on the marriage of a female infant, an estate was settled on the husband's mother for life, remainder to the husband

husband for life, remainder to the wife for life, with remainders over in bar of dower. This settlement will not bind the wife, inasmuch as the mother might (which she did) survive the husband; the wife may therefore elect to take the provision under the settlement, or her dower and free bench. *Carruthers v. Carruthers, at the Rolls, 4 Bro. C. C. 500.*

[By a marriage settlement lands were conveyed to trustees to the use of the wife for life, remainder to the use of the husband for life, remainder to the use of all and every the children of the marriage, or such of them, and for such estates, &c. as the husband and wife should appoint, and for want of such appointment to the use of all and every the child or children equally; if more than one, as tenants in common, and if but one, then to such only child, his or her heirs or assigns, for ever, remainder over. In the deed was contained a power, enabling the settlers to revoke the uses of the settlement, and the trustees to sell the estate and convey it to a purchaser, so as the purchase money should be paid to the trustees, (and not the settlers,) and invested in the purchase of other lands to the same uses: it was held that the remainder to the children was a vested remainder in fee, liable however to be divested by an appointment of the parents, and consequently (no appointment having been made) that the remainder to the children could not be defeated by a deed of revocation by the parents, and a conveyance by them and the trustees to a purchaser, who paid the consideration money to the settlers, (not to the trustees,) which was never laid out in the purchase of any other lands. That power of revocation was conditional; and as the conditions, namely, the payment of the money to the trustees, and the settling of other estates to the same uses, were not performed, the deed of revocation was a nullity. Fraud will vitiate any transaction, tho' the principal do not personally take any part in the fraud, if his agent do; for the principal is civilly responsible for the acts of his agent. 4 Term Rep. B. R. 39. *Doe v. Martin*. See also *Barnard. Ch. Rep. 153. Walpole v. Ld. Conway, 1 Ves. 174. Cunningham v. Moody.*]

(3 Z 3.) To what Charges subject.

A marriage settlement shall not be incumbered by a voluntary settlement for the raising portions for the children of a former marriage. R. 2 Vent. 363. *Vide post.* (4 I 1, &c.)

Nor, by a voluntary settlement made during a former marriage. R. Ca. Ch. 100.

So, if A. covenants to settle 200 l. per ann. without describing any lands in particular, upon the children of the first marriage, and afterwards, upon a second marriage, settles part of the land which he had at the time of the former articles, for the jointure of his second wife, who had no notice; she shall not be bound by the former articles. R. 2 Ver. 482, 3.

If A. exhibits a bill to redeem a mortgage against a woman, and suggests that her husband was only the assignee of a mortgage, the woman may give, in answer, a settlement for her jointure without notice of the mortgage, and that her husband pretended a title by descent, without answering whether her husband had any other title than as assignee of a mortgage; tho' it would not be a good plea. 2 Ver. 701.

But

But if *A.* upon his marriage gives a bond to leave to his wife 500*l.* or a third part of his personal estate, and afterwards becomes a bankrupt; the wife shall not have the 500*l.* if she does not come in as a creditor for it in proportion with other creditors; and in such case, the interest of her proportion shall be paid to the creditors during the life of her husband. *R. 2 Ver. 662.*

[If *A.* dies indebted, leaving a leasehold subject to mortgages, with covenant for payment, and other personal estate, and devises to his son for life, then to the issue of his body with limitations over, and makes him executor and residuary legatee, and he by marriage settlement calling himself heir and executor, and reciting the will, assigns this leasehold to trustees to permit him to receive the profits for life, then to his wife, then to the issue, then to those entitled under the will; yet the issue shall not have it disencumbered of their father's debts. *Clarke v. Sampson, T. 1748, 1 Ves. 100.*]

(3 Z 4.) Provision for Portions.

If a man makes a voluntary settlement for the portion of a daughter by his former wife, and then takes a second wife, and settles the same land for her jointure, without notice of the portion, and by his will devises other lands to his wife, which she refuses; the daughter shall have the other lands till her portion is raised. *1 Ver. 219. Eq. Abr. 221.*

If by marriage settlement lands are limited to the husband and wife for their lives, and afterwards to the first and other sons in tail; and if the husband dies without issue male, to *A.* for five hundred years for daughters' portions; tho' there be issue male, which survives the father, and then dies without issue, a daughter shall have the portion. *R. 1 Lev. 35.*

If *A.* after the death of his wife makes a settlement for raising 100*l.* for each of his younger children, and afterwards marries again; the children by the second wife shall have the same portions. *R. 1 Ver. 335.*

[If a widow having children, by articles, previous to her second marriage, gives 500*l.* to her intended husband during his life, and if no children of the marriage, then to return to her or her heirs; and there are children of the second marriage, who all die under age in her life, and then she dies; the husband shall have the interest for life, and then the children of the first marriage. *Steadman v. Palling, H. 1746, 3 Atkyns, 423.*]

If land is charged with portions, the heir cannot give personal security for them in discharge of the land. *1 Ver. 338.*

Nor, shall he be allowed to pay them before the time limited by the settlement, viz. full age or marriage. *Ibid.*

If a man gives a portion to a daughter, to be paid at the age of 21 years, and she marries, and dies before; it shall be paid to her husband or her executor. *2 Ca. Ch. 94.*

If *A.* by marriage settlement makes a provision for daughters of 1500*l.* a-piece, to be paid at 18 or marriage, and if any of them die before, the survivor to take the whole; and afterwards settles other lands for the payment thereof, at the age of 21 or marriage, and that there shall be no survivorship; this controuls the first deed. *R. 2 Ch. R. 8.*

If a term is limited *after the death of the father, upon trust for raising portions for his daughters, at the age of 18 or marriage*; the term may be sold for that purpose in the lifetime of the father. *Sal. 159. Semb. 2 Ver. 355. R. 2 Ver. 459, 460. 656.*

So, if the term, after the life of the father, be upon trust, *that if the father die without issue male by his wife, having daughters*, and the wife dies without a son; the term may be sold in the lifetime of the father, for the portions of daughters, when they attain such an age or marry. *R. per three J. 2 Jon. 202. Per Cowper, 1 Sal. 159. 2 Ver. 657. Rep. 5 G. 2. 2. 22.*

[If *A.* on marriage settles his estate to himself for life, remainder to his sons in tail-male, remainder to trustees for 1000 years, to provide for daughters by profits, mortgage, or sale, with remainders over, with proviso, that if he prefers them in marriage with portions equivalent, or the remainder-man pays them, the term should cease; and the wife dies without issue male, leaving three daughters; their portions shall be raised in the father's lifetime, with interest from the mother's death, at which time they first vested. *Hebblethwaite v. Cartwright, P. 7 G. 2. C. T. T. 31.*]

[Where a term for years or other estate is limited to trustees for raising portions for daughters, payable at a certain time, which is become a vested interest, they shall not stay to the death of father and mother, unless some intention appears (and a very slight circumstance is sufficient) to postpone it. *Stanley v. Stanley, M. 1737, 1 Atkyns, 549.*]

If the term is to raise portions for daughters, and the inheritance descends to the lessee, *Chancery* will prevent the merger of the term. *2 Ver. 91. 208. Vide post. (4 W 24.)*

So, if one has a power to raise portions for children, and by deed charges them upon land, but by the eviction of part, the residue is not sufficient; the land may be decreed to be sold. *2 Ver. 311.*

Tho' he adds, *that for the raising them the trustees shall take all the rents and profits*; for that does not restrain the general charge. *R. 2 Ver. 311.*

If there be a term for raising portions for daughters, without saying *at what age or time*; they shall be raised with reasonable maintenance from the death of the father. *2 Ver. 460.*

If the portion is to be raised *as the father shall appoint*, it shall be raised, tho' the father dies without appointment. *2 Ver. 665.*

But if portions for daughters *at such an age, if the father dies without issue male, are to be raised for his daughters, if not otherwise provided for, and 30 l. per ann. in the interim*; tho' the mother dies without a son, the term shall not be decreed to be sold for the daughters' portions; for the other contingency, *if they are not otherwise provided for*, cannot happen during the life of the father. *R. 1 Sal. 160. 2 Ver. 640. 657.*

So, the 30 l. per ann. shall not be decreed to the daughter or her husband; for the father shall not pay maintenance out of the profits of a term not to commence till his death; and therefore it must be intended of maintenance to be paid if the father dies without issue male, before the age or marriage of his daughter. *R. 1 Sal. 160.*

If *A.* gives portions to his younger children, secured by a mortgage

gage from *B.*, and if the heir of *A.* does not pay them, that they shall be charged upon his land; *B.* pays the portions, which are put out upon another security, approved of by a master in Chancery, with the consent of the guardian, and are afterwards lost; the land of the heir shall not afterwards be charged. *R. 1 Ver. 337.*

If land is charged with 500*l.* for *A.* and the trustee raises the sum and gives a judgment to *A.* for it, and then dies insolvent; the land shall be discharged. *Dub. 2 Ver. 85.*

If a term after the death of husband and wife is for the raising of portions out of the profits after the commencement of the term, to be paid at the age of 21; neither the principal or the interest shall be raised till the term commences in possession. *2 Ver. 761. 1 P. W. 449.*

[If by marriage settlement lands are limited to *A.* for life without waste, remainder to trustees to preserve, &c. to wife for life, remainder to his first and other sons of *A.*, and, in default, remainder to trustees for 500 years, in trust, by rents or sale, to raise 2000*l.* for daughter, to be paid at 21 or marriage; the daughter shall not have it raised in the father's lifetime. *Stevens v. Dethick, H. 1743, 3 Atkyns, 39.*]

If a portion is to be paid by the personal estate, and if that is not sufficient, by the rents and profits of the real; if it is necessary, the real estate shall be sold to make it good. *R. 2 Ver. 424.*

So, if a term commences after the death of the husband, to raise portions, if no son, for daughters, provided that the daughters survive their father; no portion shall be raised if the daughter dies in the lifetime of her father, tho' she married before her death. *R. 2 Ver. 665.*

So, if a portion is payable, and before payment one child dies; it shall be decreed to his executor or administrator. *R. 1 Ver. 276.*

[If there is provision for daughters' portions, by a term after the mother's death, to grow due and payable at 21 or marriage, and if any die before portion due and payable, to the survivors; and there are two daughters who both attain 21, and marry with consent, and one dies, leaving children, before the mother, her portion shall go to her representatives, and not to her sister. *Emperor v. Rolfe, H. 1748, 1 Ves. 208.*]

[Settlement on marriage to the use of the husband for life, remainder to trustees for 500 years, in trust after the death of the husband, and not before, unless with his consent, as therein mentioned, to raise portions for younger children, to be paid in such shares and at such times as the husband and wife should appoint; in default of appointment, to be paid, if but one, besides an eldest or only son, 5000*l.*, if two 6000*l.*, if three 8000*l.*, and if four or more 10,000*l.* equally, to be paid respectively at 21 or marriage of daughters, if after the age of 16, if such times of payment happen after the death of the husband; if in his life, then within twelve months after his decease, and not before, unless with such consent; provided, that if any of such younger children should die before his, her, or their portions should become payable, so that the number should be reduced to less than four, no more should be raised than what would make the whole sum for the portion of the survivor or survivors of such

such younger children equal to the sum originally limited for the portion or portions of such child or children, if one, two, or three: three younger children only survived their father; but more than four had attained 21; the sum to be raised was held to be 10,000*l.* *Willis v. Willis*, 3 *Ves. jun.* 51.]

If a term is upon trust, that if the father dies without a son, to raise portions for daughters *out of the rents and profits, as soon as conveniently may be*; they may be raised by sale. *Per Parker*, *P. W.* 417. 420.

Otherwise, if it was *out of the annual rents and profits, or by leases for lives or years. Per Macclesfield, and affirmed in parliament*, 2 *P. W.* 19. *Vide* 1 *P. W.* 419.

[So, if on marriage of *A.* and *B.*, *A.* settles his estate, and therein provides for raising portions for daughters, and the father of *B.* settles his estate, and therein is a term, (with several remainders over,) the trust of which is to raise 10,000*l.* for younger children, by rents, issues, and profits, or leases for three lives, or determinable upon three lives, reserving the old rent, or by granting copyholds on fines, to be paid to daughters at 18 or marriage, and to the sons at 21, or as soon after as it could be raised out of the premises *as aforesaid*; the 10,000*l.* cannot be raised by sale or mortgage. *Semb. per Macclesfield C. Mills v. Banks*, *T.* 1724, 3 *P. W.* 1.]

But if a younger child dies in the lifetime of the father, before marriage, the portion shall not be raised. 1 *Ver.* 335. *Vide ante*, (3 *P.* 3.)

[If there is a term of years to raise daughters' portions, payable at 16, and a proviso, that if there is no daughter living at the time of the failure of issue male, the term shall attend the inheritance; and there is one daughter, who attains 16, marries without consent, and no son by the marriage, and the daughter dies without issue *in the lifetime of her father and mother*, the portion sinks. *Gordon v. Rayner*, *P.* 1732, *P. W.* 134.]

[If 9000*l.* is settled by marriage articles in trust for husband and wife for life, and then to the eldest son, subject to raise and pay 5000*l.* to younger children as father should appoint, and for want of appointment at 21, and trustees in the mean time at liberty to raise maintenance; mother dies, leaving two children, youngest dies at two, father cannot claim the 5000*l.* as his representative, it not vesting in the children, and there are no words of vesting, but raising and paying at 21. *Hubert v. Parsons*, *P.* 1751, 2 *Ves.* 261.]

[If by articles 2000*l.* part of 3000*l.* vested in trustees, is to be paid to such son as shall attain 21, when he shall have attained 23, and the eldest attains 21, and dies before 23, it is a vested interest at 21, and the time of payment only is postponed. *Combe v. Combe*, *T.* 1741, 2 *Atkyns*, 185.]

If the land is not sufficient to raise portions for all, there shall be an abatement in proportion. 1 *Ver.* 335.

[If *A.* by articles before marriage agrees to settle land on *B.* for jointure, then part to raise portions for younger children, then the whole in tail-male, and that *B.*'s portion should remain with trustees till settlement made, but to enable *A.* to settle *B.*'s portion to be applied to pay off incumbrances, and the rest to *A.* and marriage
had,

had, no settlement made; *A.* dies, no land appears, the right to the portion survives to the wife, and the issue of the marriage are not entitled. *Pyke v. Pyke*, *H.* 1749, 1 *Ves.* 376.]

A portion secured by settlement, or articles for a settlement, shall not be raised as a debt out of the personal assets. 2 *P. W.*

437.

[If a husband promises his wife that her daughter shall have her jewels, and after her death puts them in a chest, and delivers them with an inventory and the key to a friend, for the daughter's use; this is a sufficient delivery to vest the property, and shall not be altered by his afterwards taking out some of the jewels, and giving them to his second wife. *Lucas v. Lucas*, *T.* 1738, 1 *Atkyns*, 270.]

[If in settlement there is a term to raise 1000*l.* for daughters' portions, with proviso, that if father by deed or will gives or leaves any sum of money to his daughters, it should be a satisfaction *pro tanto*, unless he declare the contrary, and he leaves them land; this is no satisfaction. *Per Talbot C. Chaplin v. Chaplin*, *P.* 1734, 3 *P. W.* 245.]

[If by marriage settlement a term is created in lands in trust to raise portions for daughters, with proviso, that if lands of an estate of inheritance descend from the husband to his said daughters of as great value as the portions, then the term to cease for the benefit of the next in remainder or reversion; neither lands of which the husband is seised in fee, and devises to his daughters in tail, nor lands descending from him to them in tail, nor reversions in tail expectant on the death of others, are such estates of inheritance as are within the meaning of the proviso. Lands which ought to go in satisfaction shall be valued at the time of the descent, not when the portions become payable. *Savile v. Savile*, *P.* 1740, 2 *Atkyns*, 458.]

[A limitation to a daughter after several other limitations, is considered as a provision; the time when it is to take place makes no difference. *Goring v. Nash*, *M.* 1744, 3 *Atkyns*, 186.]

[If a man has a power by marriage settlement to raise a sum for the portion and portions of all and every younger child and children, in such manner, at such time, and under such limitations, as he by will shall direct, and he by will, reciting that two of his three younger children are amply provided for, appoints the whole to the third; the power is not pursued, and it is a void appointment. *Menney v. Walker*, *P.* 8 *G.* 2. *C. T. T.* 72.]

[But if father has a power to raise 1500*l.* for the benefit of younger children, in such proportion, manner, and form, in all respect, as he shall appoint, and he directs 450*l.* to *A.*, 1050*l.* to *B.*, and nothing to *C.* who has a good estate; it is a good appointment. *Austen v. Austen*, *H.* 1733, *C. T. T.* 74.]

[Where a sum is provided by marriage settlement for younger children, and one of them becomes eldest, he shall have no part of this sum; but where by private act of parliament the sum was to be appointed to *A.*, *B.*, and *C.* by name, tho' *A.* then a younger child afterwards becomes eldest; he is capable of an appointment in his favour. *Jermyn v. Fellows*, *P.* 11 *G.* 2. *C. T. T.* 93. *Qu.* Would it not be the same if they were named in a settlement by deed?] Vol. II.

[If by marriage articles it is agreed, that certain sums be paid to trustees to permit the interest to be taken by husband for life, then by wife for life, then if there is a son, and younger child or children, to pay the principal sums to them; and a farther covenant that the wife's father shall procure his sister to settle certain freehold houses to the same uses, and they are so settled; and husband and wife die, leaving a daughter their eldest child, and a son; the daughter shall be considered as a younger child, and have the money, and also the houses; for the articles and the deed shall be considered as one and the same act, and equally a provision for younger children. *Heneage v. Hunloke, M. 1742, 2 Atkyns, 456.*]

[If a grandmother *A.* having a power creates a term to commence after her death to raise 300 *l. per ann.* for *B.* for life, and after both their deaths to raise a sum to be paid among all the children of *C.* except the eldest son, as *C.* shall appoint, and for want, equally; if *C.* has but one child, besides eldest son, all to such child; if only eldest son, all to him; if no eldest son, then to the executors of *A.*: at making, *C.* has only son *D.* and daughter *E.*, afterwards another son *F.*; *C.* dies first without appointing, *D.* dies under age, and *F.* becomes eldest son; *E.* marries, *A.* dies, and then *B.* dies; this shall be construed as provision by marriage settlement; and to avoid the inconveniences of the portions vesting either at the execution or the death of *A.* or the death of *C.* or of *B.*, the court will determine the capacity of being a younger son to continue till the time of payment, and *E.* shall have the whole sum. *Ld. Tynham v. Webb, H. 1750, 2 Ves. 198.*]

[If *A.* settles his estate, subject to a proviso, on his sister and husband, and their issue in strict tail-male, for them to raise 12,000 *l.* for their children, and if they die without appointing the proportion, then 2000 *l.* to be raised for each younger son, and 3000 *l.* for each daughter, payable at 21, with interest from the time of appointment or death of the survivor, and they die without making appointment, leaving four younger sons and two daughters, 14,000 *l.* shall be raised for them, and interest only from the death of the survivor, tho' two attained 21 during her life. *Rolt v. Rolt, H. 9 G. 2. C. T. T. 189.*]

[If *A.* on marriage settles long annuities in trust for himself for life, to his wife for life, to the children in such manner as he should appoint, and dies without appointment, leaving one child, it is entitled to them as an interest vested; the father having only power of disposing among his children, and there being but one, she is entitled to the whole. *Bellasis v. Uthwatt, H. 1737, 1 Atkyns, 426.*]

[Where children have obtained a contingent advantage under a marriage settlement, the court will not vary it after marriage; thus, if stock is transferred to trustees to pay the dividends to the separate use of the wife during life, and if she survived her husband to transfer to her, or whom she should appoint, and for want of appointment to her issue; the court will not suffer any part of the stock to be sold and paid to her during coverture. *Okeefe v. Calthorp, M. 1739, 1 Atkyns, 17.*]

[If *A.* by deed on the marriage of his son *B.* settles lands on the issue male of *B.*, and if none, then to be sold and equally divided among *B.*'s daughters; and by deed *B.* directs his estate to be sold,

and the money equally divided among his six daughters, provided he should have no son; and afterwards, after the marriage of *C.*, one of the daughters with *D.*, he by deed, reciting the last covenants that all right either in land or money, that should accrue to *C.* in her life, or to *D.* in her right, by the said recited deed, should be vested in trustees, to put out such share of the money raised by sale of the manors, &c. as belonged to *C.* at interest, and the rents of her share of the estate, and the interest of the money raised by sale thereof to pay to *D.* for life, then to *C.* for life, then to pay the principal to the issue of *D.* by *C.* (except the issue male of *D.* by *C.* for the time being inheritable in the manors, &c.) share and share alike to sons at 21, to daughters at 21 or marriage; if any die before their shares payable, to go to the survivor; if all die, then to such inheritable son; if no son, then to the survivor of *D.* and *C.* and the executors, &c. of such survivor; and there is one child of this marriage who survives his father, and then attains 21, and dies in his mother's lifetime; the estate shall be sold and divided equally among the surviving daughters of *B.*, one being dead unmarried, and the share of *C.* belongs to her solely, and no part of it to her son by *D.* *Seamer v. Bingham*, T. 1743, 3 *Atkyns*, 54.]

[The court will decree the provision made for one child to be as extensive as the parent intended, where it does not introduce a hardship or leave the other children in distress. *Goring v. Nafib*, M. 1744, 3 *Atkyns*, 186.]

[If *A.* by marriage settlement recites the provisions he is entitled to by his father's settlement, and *inter al.* a share of 2000*l.* after his father's death, and there is a trust for the benefit of the issue of the marriage, and a covenant that all *A.*'s share of the 2000*l.* or any other provision for the portions of the father's younger children as should come to *A.* shall be within said trust; and afterwards the surplus profits of the father's estate limited for the benefit of his children, is in his lifetime decreed to be distributed among them; the surplus shall not be included in the trust, nor would a legacy from the father to *A.* be included. *Vane v. Vane*, M. 1747, 1 *Vesf.* 57.]

[If a bond is given for 2000*l.* for children living at the death of father or mother, and in default, to the executors of husband, a child born after the father's death shall have a share. *Miller v. Turner*, H. 1747, 1 *Vesf.* 35.]

[If a decree has settled a wife's portion to be laid out in land for husband for life, wife for life, and then to the issue; the court will not afterwards on a suggestion that there is no probability of issue, and that the husband is in great distress, grant part to pay his debts, and the rest to wife's separate use. *Anon.* M. 1750, 2 *Vesf.* 113.]

If 20,000*l.* is provided for younger children as father shall appoint, and there are three daughters and a son, and father makes another settlement reciting this provision, and his intent that the daughters should have the whole, and settles on the son in satisfaction of his provision, on condition he releases, but makes no direct appointment of his son's share to the daughters, and afterwards by will gives his daughters so much as (with what is provided by his

marriage settlement) makes their fortunes 10,000*l.*; they shall have only 10,000*l.* and not a share of the brother's 5000*l.* likewise. *D. Bridgewater v. Egerton, H. 1750, 2 Ves. 121.*]

[If by settlement after marriage (but for valuable consideration) there is a trust to raise portions for daughters on failure of issue-male, on whom the estate was settled in tail, they shall be raised; tho' the portion or consideration was not paid, tho' the term was in remainder after estates-tail, and tho' a daughter has given a general release, the settlement not being known. *Hylton v. Biscoe, T. 1751, 2 Ves. 304.*]

[If estate is settled to husband and wife for life, then to trustees for a term, in case of no issue-male, or they die before 21, to raise portions for daughters; proviso, if they have son who shall have issue-male, or attain 21, then the term to cease; and they have a son who attains 21, and dies without issue-male in the father's life; the portions shall not be raised. *Worsley v. E. Granville, T. 1751, 2 Ves. 331.*]

[If a father voluntarily settles 4000*l.* a-piece on his five daughters, and by the same deed binds himself in 25,000*l.* to secure the surplus of his estate above 20,000*l.* to his daughters; this shall be looked on as a bond to the daughters, good against voluntary claimants, but not against creditors for valuable consideration. *Boughton v. Boughton, M. 1739, 1 Atkyns, 625.*]

[Tenant for life shall not account for rents and profits towards raising portions, but only keep down the interest; the portions shall be raised on the whole estate. *Savile v. Savile, P. 1740, 2 Atkyns, 458*]

(3 Z 5.) Restraint of Marriage.

(3 Z 5.) *When the husband shall make a settlement for the portion.*] If a marriage be contrary to the consent of parents, and the husband sues for the portion; the court will not decree it, unless the husband makes a suitable settlement. 2 *Sbo.* 282.

[If husband and wife sue for a legacy given to the wife, the court will not compel the payment, unless the husband makes a settlement on the wife. *Brown v. Elton, M. 1733, 3 P.W. 292.*]

Or, if without the privity of the trustees for the wife; the portion shall be vested in trust for the wife, and not decreed to the husband, till he makes a suitable settlement. *R. Ch. R.* 146.

If the wife has a real estate by descent from her brother, which was vested in trustees in trust for her; and the husband sues in *Chancery* for an execution of the trust, or for other favour; the court will oblige the husband to do what is reasonable. 1 *Ver.* 40.

[If on marriage application is made to the court to take care of wife's portion, and husband offers before the master to settle an estate in strict settlement, but before it is done, they having no children, petition to have it paid to husband, the court will not order it; for nobody can consent for the children that may be. *Anon. T. 1755, 2 Ves. 671.*]

[If money is left by a father to trustees for the benefit of his children, to be equally divided between them; and one of them a daughter, marries, being under age, and without settlement; and her husband, whilst

whilst she is under age, and before the trustees have done any act to settle or divide father's estate, assigns all the share he is entitled to in right of his wife to a creditor; the court will not allow such creditor to receive the whole fortune, without making some provision for the wife. *Jewson v. Moulson*, M. 1742, 2 *Atkyns*, 417.]

[If a father gives bond to his daughter, payable at marriage, and deposits it in a third person's hands, she marries without consent, the bond is delivered to husband, and he sues on it; on a bill brought by the father, and bringing the money into court, the court will order it to be settled on the wife and her children, and grant injunction. *Winch v. Page*, in Sc. M. 1721, *Bunb.* 86.]

[If a man devises 1000*l.* to his daughter payable at 21 or marriage, and she marries, and the husband and wife join in a suit in the spiritual court against the trustees and executors for the legacy, and the executors bring bill to compel the husband to settle the legacy on the wife, the court will interfere, tho' the husband does not crave the assistance of the court, and is suing in a proper court for the recovery of it. *Harrison v. Buckle*, M. 6 G. Str. 238. *Gardner v. Walker*, H. 8 G. Str. 503.]

[Tho' the wife of age, appears, and is desirous that her whole fortune may be paid to her husband, yet the court will order settlement of part. *Ex parte Higham*, T. 1754, 2 *Ves.* 519. See also *Stackpole v. Beaumont*, 3 *Ves. jun.* 89.]

[Where there is a slender provision made for a wife, on an accession of fortune to the wife, (if considerable, otherwise not,) the court will oblige the husband to make further provision. *March v. Head*, T. 1749, 3 *Atkyns*, 720.]

(3 Z 6.) *When. not.*] But upon a bill by a father against an husband, who married his daughter without consent, to make a settlement of the land of the wife, the court will not compel him; for the father has no equity to demand it. *R. upon a Demurrer to such Bill*, 1 *Ver.* 39.

So, if a portion is given to a daughter, and if she marries without the consent of A. to another; if the daughter will not marry, and gives security to indemnify the executor against the other person, she shall have the portion for the purchasing of an annuity. *R. Ch. R.* 62.

So, if the husband and wife demand a conveyance of lands settled in trust for the wife; the trustee ought to execute his trust, without requiring a settlement by the husband. *R. 2 Ver.* 626.

So, if the husband prays that the portion may be raised; the court, upon circumstances, will allow part to the husband, without a settlement. 2 *Ver.* 762.

[If money is charged in trust for provision for a daughter, and she marries without consent, yet if she appear and desires the whole may be paid to her husband without any provision, the court will direct it, tho' the husband is insolvent; for she may dispose of personal estate as she might of real by a fine. *Willats v. Cay*, M. 1740, 2 *Atkyns*, 67. *Contra ex parte Higham supra*, (3 Z 5.)]

[If husband has made a settlement on his wife on marriage, and afterwards money comes to her by devise, the court will not require the

the husband (if a man of credit) to make a further settlement at the prayer of the executor. *Adams v. Pierce*, T. 1724, 3 P.W. 11.]

[Or, if the husband is a freeman of London, and in a thriving way. *Ibid.*]

(3 Z 7.) *When the wife shall lose her portion.*] If a man devises that his daughter shall have 2000*l.* portion, but if she marries before the age of 16, or without the consent of A. and B., she shall have only 1000*l.* If she marries with the consent, &c. before 16, she shall have but 1000*l.* R. 2 Vent. 365. R. 2 Ver. 223. *cont.* that she shall have the 2000*l.*

If the father by his will devises 2000*l.* to his daughter, and afterwards revokes the legacy if she marries B., and the daughter marries B., the legacy is lost. R. 1 Ver. 20.

But if the daughter has a portion by a settlement, the father cannot annex a condition to it, that she shall not marry without consent. 2 Ver. 452.

If A. gives his daughter 200*l.* provided she continues with his executor till 21; but if she shall be taken from the executor by her mother, who was a papist, or marries against the consent of the executor, then only 10*l.* The daughter being placed by the executor with B. a clergyman, with his leave visits her mother, and there marries a papist, without the privity of B. or of the executor, who upon notice dissents; the daughter shall have only 10*l.* for the qualification annexed to the devise was in nature of a condition precedent; and the clandestine marriage, which the executor immediately disapproved, was against his consent. *Cont. per Master of the Rolls; but per Cowper, acc.* 2 Ver. 573.

[If a man by settlement after marriage creates a term in trust, to raise 2000*l.* a-piece for his daughters, provided they marry with their mother's consent, and a yearly sum to be paid them till they marry, and if either of them die before marriage with such consent, her portion to cease, and the premises to be exonerated of it, or, if raised, to be paid to whom the premises should belong, and by will creates another trust term to raise 2000*l.* a-piece more for each of his daughters, subject to the same conditions, and by codicil creates another trust term for the better raising them; if the daughters marry without the mother's consent, (even after they are of full age,) they shall not have either of the sums. *Per Hardwicke C. Lee C. J. and Willes C. J.* reversing a decree of *Jekyll M. R. Hervey v. Aston*, M. 10 G. 2. C. T. T. 212. P. 13 G. 2. (Com. 726.) *Wilkes*, 83. S. C.]

[If in marriage settlement it is provided, that if any younger child marries without father's consent in his life, or after his death without mother's consent, such child shall forfeit the intended fortune, to be distributed among the rest at 21 or marriage, with consent, with further proviso, that if any such child marry without consent, or die before 21, or marriage with consent, the portion to be divided among the survivors at 21 or marriage, with consent, and A. one of the daughters marries without consent, she forfeits the whole interest under the settlement, whether certain or contingent, and therefore, if another of them dies, she is not entitled to her distributive

lative share of her portion. *Wrottesley v. Wrottesley*, T. 1743, 2 *Atkyns*, 584.]

[If legacies are left payable at 21 or marriage, which shall first happen, provided they marry with consent, otherwise to sink into testator's personal estate; the legacies vest at 21, and marrying without consent afterwards is of no consequence. *Pullen v. Ready*, M. 1743, 2 *Atkyns*, 587.]

When a condition, that a person shall not marry without consent, is in *terrorem*. *Vide ante*, (2 Q 6.)

(3 Z 8.) When Marriage Brokage shall be avoided.

A bond given for the procurement of a marriage between A. and B. shall not be allowed. *Decreed cont.* if it be without fraud; but the decree was reversed in Parliament. R. 3 *Lev.* 411. *Vide* 1 *Ver.* 412.

So, if upon the marriage of a son, the portion is paid to his mother; the son shall be aided in equity. 1 *Ver.* 451.

If a woman borrows money of her brother, for the augmentation of her portion, and gives a bond for it; the bond or other security shall be avoided in equity as fraudulent. 1 *Ver.* 475. *Vide post.* (4 D 3.)

Tho' the husband dies without issue, it shall be void against the wife herself or her executor. R. 1 *Ver.* 475.

If a mother, upon the marriage of her son, agrees to relinquish her jointure, for which the son privately agrees to make a lease to the mother of another estate; this clandestine agreement shall be disallowed in equity. R. 2 *Ver.* 466. 500.

[If a man on his son's marriage settles part of his lands on the son in possession, and other part on himself for life, remainder to the son, with power reserved to the father to make a jointure of 200 l. on payment of 1000 l. to the son; and on the father's subsequent marriage, the son (without privity of his wife or her relations,) releases the 1000 l. and the father (without the privity of his second wife or her relations,) gives a bond for it; equity will not set the bond aside. *Roberts v. Roberts*, T. 1730, 3 *P. W.* 66.]

So, a gratuity given for the procurement of a marriage, shall be refunded. 2 *Ver.* 392.

So, a lease made by A. for procuring a marriage between him and B. shall be avoided after his death, by him in remainder. R. in *Parl.* 2 *Ver.* 446. *Pr. Ch.* 166.

So, if a daughter has a portion by a remote relation, and the father takes a bond, before he will give his consent to her marriage, that the husband shall repay part, if his wife should die without issue; for where the portion does not come from the father, he shall not lay any such restraint upon it. R. 2 *Ver.* 588.

So, if upon a marriage, the husband gives a bond, that he will release to the father all demands, within two years after the marriage. R. 2 *Ver.* 652.

[If previous to marriage of A. and B. then 20 years old, articles are entered into, first to secure 100 l. *per ann.* to C. (B.'s servant) out of B.'s estate, then the estate settled to the use of B. and her issue, (but these other provisions revokable by her after marriage,) and

and about the same time *A.* gives *C.* a bond for 1000*l.* which is afterwards given up to be cancelled, and a recovery is suffered to the uses of the articles, and a new grant three years after is made of the annuity, which is paid by *A.* for some time after *B.*'s death, who afterwards brings bill to be relieved against it as given for marriage brokage, and *C.* insists it was for her service and attendance; the court will direct issues to try whether the bond was given in consideration of the marriage, or for what other; whether it was made payable on the marriage, or when, and whether the annuity was granted in consideration of the bond, or procuring the marriage, or what other consideration, and if any other consideration, or time, to be indorsed; if the bond was given for the marriage, and delivered up when the annuity confirmed, it will be marriage brokage; if the annuity free from corrupt management, and the bond only given because *B.* not then of age, otherwise. *Cole v. Gibson*, T. 1750, 1 *Ves.* 503.]

(3 Z 9.) What shall be done if the Marriage is disappointed.

If a copyhold is surrendered to *B.* and *C.* who intend to be husband and wife, for their lives, and he dies before the marriage, and she enjoys it for thirty years; she shall be decreed to surrender and to account for the profits. 1 *Ver.* 432.

[If *A.* an old man, in contemplation of a marriage to his own prejudice, and to the benefit of *B.* to whom he is indebted 1050*l.* by lease and release grants to trustees to the use of *B.* for life, then to trustees to preserve contingent remainders, then as to such lands, &c. as *B.* shall think proper, to trustees for the life of such person as *B.* shall appoint in trust for such person, and for want of appointment to *C.* for 500 years, to raise portions for *B.*'s younger children, and then to the use of the heirs of the body of *B.*, and for want thereof, to such person, &c. as *B.* should appoint, with power to charge it with 1000*l.*, and that *B.* may revoke appointment, and make new, and for want of appointment, to *B.* and her heirs; and *B.* afterwards appoints the lands, &c. and the reversions expectant on her death, if she dies before her marriage with *A.*, to *A.* and his heirs, he paying 700*l.* to, &c. and afterwards makes a new appointment of the premises after her death to *A.* for life, then to the heirs of their bodies, then to *D.*, &c.; *A.* dies, *B.* levies a fine to herself and heirs, many years after bill is filed by heir at law, *B.* pleads purchase, over-ruled, then suffers recovery; the heir at law is barred of legal right, nor is there ground to give relief in equity, on fraud, intended marriage not taking effect, or mistake; but if heir at law will try it at law, the court will remove the 500 years term. *Langley v. Brown*, T. 1741, 2 *Atkyns*, 195.]

[If a person who has made addresses for some time, and has reasonable expectation of success, makes presents, and the lady deceives him afterwards, the presents or value shall be returned; but if they are made by a person to introduce himself, he is to be looked on as an adventurer, especially if their fortunes are disproportionate, and the presents or value shall not be returned. *Robinson v. Cumming*, T. 1742, 2 *Atkyns*, 409.]

(3 Z 10.) Or, the Portion is not all paid.

If by marriage articles, in consideration of 3000 *l.* portion, *A.* is bound to settle 300 *l.* *per ann.* and afterwards it appears that 1000 *l.* of the portion was upon a prior marriage agreed to be applied otherwise; the husband shall be decreed to answer this 1000 *l.* being bound by the covenant of the wife *dum sola.* *R. 2 Ver. 448.*

If *A.* by will makes his son *B.* tenant for life without waste, with power to make jointure not exceeding 100 *l.* *per ann.* for every 1000 *l.* portion received, with further power to settle money on younger children, and *B.* marries *C.* who has 10,000 *l.*, 2000 *l.* whereof is settled to continue at interest to increase the portions of younger children as *B.* and *C.* shall appoint, or in default, equally, if any; if none, to the survivor of *B.* and *C.* in the mean time, the interest to *B.* for life; this shall be considered as a portion of 10,000 *l.* received by *B.*, and he may settle accordingly. *B. Tyrconnel v. D. Ancaster, T. 1754, 2 Ves. 499.*

(3 Z 11.) When a Marriage Settlement shall pursue the Articles strictly.

[If articles are entred into before marriage, and settlement after marriage differs from them, the court will set up the articles against the settlement. *Legg v. Goldwire, M. 10 G. 2. C. T. T. 20.*]

[But if both articles and settlement are previous to the marriage, the settlement shall controul the articles. *Ibid.*]

[Except the settlement is expressly said to be in pursuance and performance of the articles. *West v. Erissey, M. 13 G. Ibid.*]

If marriage articles are executed, the settlement ought to be made strictly pursuant to the articles; and equity will decree accordingly.

And therefore, if the articles are, that the settlement shall be to the husband and wife and for life, remainder to the heirs of their bodies; the court will decree an estate-tail to the son. *Eq. Ca. 130. 165.*

And if the husband, without the consent of the trustees or of the son, then being of full age, devises the estate to the eldest son for life, remainder to his first and other sons in tail male, the devise not being pursuant to the articles shall be avoided. *R. Eq. Ca. 130.*

So, if a bill is brought for execution of the articles, the court will direct a strict settlement. *Eq. Ca. 131. R. F. g. 38.*

As, if the articles are for a settlement, *within two years, to the use of B. for life, remainder to the heirs of his body*, and if not made, to stand seized to the same uses; the court will direct a strict settlement. *R. 1 P. W. 622.*

[If by articles previous to marriage of *A.* with *B.*, *A.* covenants with *B.*'s father, to settle lands to *A.* for life, *B.* for life, and then to the issue of this match, in such sort, manner, and form, and subject to such charges for younger children as *A.* shall appoint: and it is agreed that all further covenants for assuring the premises to the said uses, or others to be agreed on by all the parties, shall be contained in the settlement; if there is a daughter, an only child of the marriage, she shall have all the land as tenant in tail, and the son of a second

cond marriage shall convey to her. *Hart v. Middleburst*, T. 1746, 3 *Atkyns*, 371.]

(3 Z 12.) When it shall pursue the Intent of the Articles.

But where by articles it is agreed, that the settlement shall be to the husband and wife for life, remainder to their issues of their bodies; if the father afterwards, with the consent of the trustees, make a settlement upon his son for life, and to his wife for life, remainder to preserve contingent estates, remainder to the first and other children of that marriage in tail; the court will not avoid it. *R. Eq. Ca.* 130. 132.

So, if the father makes a settlement upon the son for life, with power to make a jointure upon another wife, of 600l. per ann. remainder *ut supra*; the son cannot make a larger jointure, tho' he had an estate-tail by the articles. *Eq. Ca.* 131.

So, if the father makes a settlement pursuant to articles, tho' it varies from a strict settlement, and gives an estate in tail general to the wife, upon default of issue male; the court will not avoid it. *Ibid.*

[If part of an estate is limited to husband for life, remainder to wife for life, and after death of survivor, to heirs of the body of wife by husband, and other part to husband for life, remainder to heirs of his body, remainder to wife; the whole shall not be decreed in strict settlement, for it appears that part was intended to be left in the power of the father, other part not in his power alone. *Howel v. Howel*, T. 1751, 2 *Ves.* 358.]

(4 A) Mortgage.

(4 A 1.) The Nature of it.

A Mortgage is but a pledge, or security for money, in its nature. *Co. Lit.* 205. *Ca. Ch.* 285. *Eq. Abr.* 311.

And shall be taken as part of the personal estate. *Ca. Ch.* 285.

A mortgage is redeemable in its nature; and therefore, a covenant that it shall not be redeemed, is void. 2 *Vent.* 364, 5. 2 *Ca. Ch.* 61.

And till redemption, the estate is in the mortgagee by law and equity. *Ibid.* 97.

So, a covenant that it shall not be redeemed after the death of the mortgagor, &c. is void, and it shall be always redeemable. *Ibid.* 61.

So, if the agreement be, that A. or his heirs male may redeem; the heir general or assignee may redeem. *R.* 2 *Ca. Ch.* 148. 1 *Ver.* 33. 190.

But by the *st.* 4 & 5 *W. & M.* 16. if any mortgage land for a valuable consideration, and give not notice in writing under hand, before executing it, of a former mortgage on all or part of the same land, such second mortgagee shall hold as an absolute purchaser, freed from equity of redemption, in respect to the mortgagor, his heirs, executors, administrators, or assigns.

So, if he gave not such notice of a former judgment, statute, or recognizance, given for security of money or like valuable consideration,

tion, unless, on notice thereof, under hand and seal, of mortgagee, attested by two witnesses, the mortgagor discharge such former incumbrance in six months after.

[Assignment of rents and profits, or of deeds, is an equitable lien; and assignee may in equity insist on a mortgage. *Ex parte Wills*, 1 Ves. jun. 162.]

(4 A 2.) What shall be said to be a Mortgage.

If a man upon marriage agrees to make a settlement for a jointure, and to the intent that the land be discharged of 900*l.* after the death of the jointress to A. and his heirs, upon trust for the husband and his heirs, if he pays the 900*l.* within three years, but if he does not pay it, or dies, in trust for the wife and her heirs for discharge of the debt and her greater advancement; this is a mortgage, for artificial words do not alter the nature of it. *R. 2 Ca. Ch. 34.*

So, if a man makes a mortgage, and by the same deed covenants that it shall not be redeemed, but during his life; yet it is a mortgage, and shall be always redeemable, as well after his death as before. *2 Ca. Ch. 61.*

So, if the condition is, that he or the heirs male of his body may redeem. *R. 1 Ver. 33. 190. 2 Ca. Ch. 148.*

[So, if upon a bill for foreclosure against the mortgagor and his creditors, one creditor redeems by the consent of the others, and the mortgage is assigned to him, whereupon he agrees, that if the creditors pay him his debt before such a day, they may redeem; this gives them a new equity of redemption, and they may redeem 20 years afterwards. *R. 1 Ver. 138.*]

If a man makes a conditional surrender of a copyhold, to be void on payment of 200*l.* at such a day, and if he does not pay it, that on payment of such other sum the mortgagee shall be a purchaser; the surrenderer dies before the day of payment, and the 200*l.* not being paid, the surrenderee pays the other sum to his administrator: it continues a mortgage, and the surrenderer or his heir shall redeem on payment of the whole principal and interest. *1 Ver. 488.*

If A. for 3000*l.* grants 60*l.* per ann. for seven years, it shall be redeemed on payment of the principal and arrears. *Dub. 2 Ver. 288.*

[If A. entitled to an annuity, on personal security, of 200*l.*, being a prisoner, by indenture sells to B. 150*l.* per ann., part of said annuity, for 1050*l.*, with proviso, that if A. desires at any time to purchase back said 150*l.*, on six months' notice, B. on payment of said 1050*l.* (all arrears of annuity being paid,) shall re-assign, and there is an indorsement, that if A. should re-purchase or redeem, he shall pay 75*l.* more; this is only a loan of money. *Lawley v. Hooper, M. 1745, 3 Atkyns, 278.*]

If a conveyance be of 200*l.* per ann. for 250*l.* to the father, who afterwards exhibits a bill for foreclosure, but does not proceed further; it shall be taken for a mortgage, tho' there were long leases and no redemption for 27 years. *R. 1 Ch. R. 222.*

If a conveyance be absolute, but the vendee agrees by writing under hand and seal to accept his money within a year, it shall be redeemable. *R. 2 Ver. 84.*

(4 A 3.) What not.

But an absolute conveyance shall not be deemed a mortgage, tho' it be made for an under value, if it does not appear to be so intended at the time of the making, by condition in the same, or by other writing, &c. *D. Ca. Ch. 2.*

[Nor, because there is an incongruous covenant in the deed; as, that the vendor should not do so and so with the estate, especially if there has been long acquiescence in the grantee's possession. *Cotterell v. Purchase, H. 8 G. 2. C. T. T. 61.*]

Tho' the purchaser afterwards declare, *that he will take his money given for the consideration of the conveyance, at any time, with damages for it, or the like words*; for if it be not a mortgage *in principio*, it shall not be made so by *parol* agreement afterwards. *Ca. Ch. 2. R. 1 Ver. 268.*

So, it shall not be deemed a mortgage, if there be not a mutual remedy, for the mortgagor to have a redemption, and for the mortgagee to enforce the payment of his money. *D. Ca. Ch. 2. Vide 1 Ver. 395.*

As, if a man, in consideration of 1000 *l.* paid to him by another, who had married his cousin, conveys land to him and his heirs, with a proviso, *that if he pays the principal and interest during his life, the other shall re-convey, and if he does not pay, that his heirs shall not redeem*: it is not a mortgage; for it was intended as a settlement, and the mortgagee could not foreclose during the mortgagor's life. *R. 2 Vent. 365. 2 Ca. Ch. 60. 1 Ver. 8. 215. 232.*

So, if a mortgage be for 500 *l.*, and mortgagor covenants to pay 700 *l.* to his wife after his death, and afterwards devises the lands to his wife, *if the 700 l. is not paid at the time, she paying the mortgage*; if the 700 *l.* is not paid, the land shall not be afterwards redeemable on payment of the 700 *l.* and 500 *l.* with interest. *Semb. per Hale, Hard. 511.*

If *A.* devise lands to *B.*, upon condition that he pay 500 *l.* to his daughter within six months after; otherwise to the daughter and her heirs; it shall not be construed a mortgage; but the daughter shall take by the limitation, if the 500 *l.* be not paid. *R. 1 Ver. 402. 430.*

Yet, where a settlement is made on daughters and their heirs, until he in remainder pay 300 *l.* to the daughters; it shall be in the nature of a security for the money, and the other incumbrances, as well as he in remainder, shall redeem, and the daughters account for the rents and profits, but not sink the principal (annually as in the case of a common mortgage) till one third of the portion be raised. *R. 2 Ver. 523. 577.*

[Law and equity will make a strong presumption in favour of 21 years uninterrupted possession, tho' circumstances seem to shew that the inheritance was not intended to be conveyed. *Cooke v. Cooke, M. 1740, 2 Atkyns, 67.*]

(4 A 4.) Who may redeem.

Altho' a mortgage be forfeited, it may be afterwards redeemed in Chancery, on payment of principal, interest, and charges.

An equity of redemption is an inherent right to the land, which binds those who come to it in the *post*, or otherwise. *Hard. 469.*

Tho'

Tho' it be the king himself. *Semb. Hard. 469.*

And the heir or executor may redeem. 1 *Ch. R.* 186. says, the heir shall redeem, and not the executor.

If the executor has assets, the heir may compel him to redeem for his benefit. *Per Hale, Hard. 512.*

If an annuity be granted out of land, with a proviso for redemption, it may be redeemed. 1 *Ver.* 209.

He who comes in by a voluntary conveyance, may redeem. 1 *Ver.* 193. *Eq. Abr.* 315.

If land be devised by the mortgagor, the devisee shall redeem and not the heir. 1 *Ch. R.* 191.

If a mortgage be made before marriage, and afterwards the same land is settled upon the wife for a jointure, the wife may redeem; and after her death the executors of the wife shall hold the land, till the mortgage, allowing a third part, is satisfied by the perception of the profits, or redemption. *Ca. Ch.* 271. *R. Ch. R.* 475. 1 *Ch. R.* 220. *Eq. Ab.* 219. 222.

So, if articles are made for a marriage settlement, and afterwards the land is mortgaged to a man who has no notice of the articles, the wife shall redeem, &c. *R. 2 Vent.* 343.

[If by articles and by settlement, both previous to marriage, lands are settled on *A.* for life, then *B.* for life, and then to the heirs male of *A.* on *B.* begotten, and *A.* suffers recovery, and mortgages to *C.*, whose representative with *A.* convey their interest and the equity of redemption to *D.*, and one person was concerned for all parties in the mortgage and assignment; the court will not set aside the mortgage, *A.* having been tenant in tail, but will give his son leave to redeem. *D. Warrick v. Warrick, H.* 1745, 3 *Atkyns*, 291.]

So, if a settlement be made after mortgage, a remote remainderman, to whom the settlement was voluntary, shall have the equity of redemption. *Semb. Ca. Ch.* 229.

So, a man entitled by settlement, shall redeem, and not the heir-general, tho' he prays it. 1 *Ver.* 182.

If *A.* and his wife mortgage the estate of the wife, and the husband covenants to pay, and afterwards does pay, but takes an assignment to himself; it shall be decreed to the heir of the wife. *R. in Parl.* 2 *Ver.* 438.

If a mortgagee purchases the reversion, the heir shall not be suffered to try the title at law, before he will declare whether he will redeem. 1 *Ch. R.* 169.

If a man makes a mortgage, or acknowledges a statute, and afterwards gives a judgment or mortgage to another, the second person shall redeem the first incumbrance. *Semb. Ca. Ch.* 36. *Cont.* 1 *Mod.* 115. *Acc. Ch. R.* 52. 2 *Ver.* 663. [Enacted accordingly by 4 & 5 *W. & M. c.* 16. where the second mortgage is without notice of the first.]

But the cognizee of a judgment shall not be aided against a purchaser in equity, unless he had express notice of the judgment before his purchase. *R. Ca. Ch.* 37.

Nor, if he had the cognizor of the judgment in execution. *Semb. cont. Ca. Ch.* 37.

[If the inheritance of land mortgaged for a term be conveyed by a defeasible but equitable title, and afterwards conveyed to another by a legal

legal and equitable title, the latter shall have the equity of redemption. *Hagshaw v. Yates*, M. 6 G. Str. 240.]

[If *A.* obtains judgment against *B.* on a promise of marriage, and before execution *B.* mortgages his whole effects, and goes abroad; *A.* shall be allowed to redeem. *King v. Marishal*, M. 1744, 3 Atkyns, 192.]

[A judgment creditor must take out execution before he is entitled to redeem. *Shirley v. Watts*, M. 1744, 3 Atkyns, 200.]

[If there is only an equity of redemption in a legal estate in a debtor, (the legal estate being in a mortgagee,) a plaintiff at law, who has lodged an *elegit* or *feri facias* with the sheriff, may come into equity to redeem a subsequent incumbrancer, and for discovery of the consideration of the assignment. *Burdon v. Kennedy*, T. 1757, 3 Atkyns, 739.]

So, a creditor by judgment shall be preferred in the redemption to a creditor by statute. R. 1 Ver. 293, 4.

If a man makes a voluntary conveyance, and afterwards mortgages the land, tho' the conveyance is fraudulent and void as to the mortgagee, yet it is sufficient to give the equity of redemption. R. Ca. Ch. 59.

If a mortgagor becomes bankrupt, the assignee of the commissioners of bankrupt shall have the equity of redemption. Dub. Ca. Ch. 71. Adm. 2 Ver. 156.

[If *A.* confesses a judgment, which is not to take place till after the death of a person, and during his life the mortgaged estate descends from *A.* to his heir, who mortgages it to *B.*, who has no notice of the judgment, the heir becomes bankrupt before the death of the person, *B.* is appointed assignee; the representative of the judgment creditor shall redeem, and not the assignee. *Stonebrow v. Thompson*, M. 1742, 2 Atkyns, 440.]

If an administrator makes a mortgage of a term, which he has as administrator, his executor shall redeem, and not the administrator *de bonis non*, &c. Ca. Ch. 224.

If land be settled upon the wife for a jointure, and afterwards the husband and wife join in a mortgage, and the husband dies, the wife may redeem, paying a third part, and the heir two parts of the principal money; and if the wife pays more than a third part, her executors shall hold the land till the residue is satisfied. R. 2 Ca. Ch. 100. But there the money borrowed was to rebuild the tenements settled; and there was a *parol* agreement that she should redeem.

So, the wife may redeem, if the redemption be limited by the husband alone to him and his heirs. 1 Ver. 213.

So, the heir or assignee may redeem, tho' the redemption be limited only for his life, or to the heir male, &c. *Vide ante*, (4 A 1.)

(4 A 5.) At what time.

No certain time is limited for the redemption of a mortgage. Ca. Ch. 102. Eq. Abr. 313.

But after 20 years, (which by the statute of limitations, is allowed for entry,) Chancery will not admit a mortgagor to redeem without special cause. *Semb.* 20 Car. 2. Ca. Ch. 102. R. 22 Car. 2. 2 Vent. 340. *Semb.* 23 Car. 2. Ca. Ch. 220. 1 Ch. R. 128. 266. Eq. Ca. 185. Eq. Abr. 315. *Jenner v. Tracy*, P. 1731, *Belch v. Harvey*, M. 1736, 3 P. W. 288.

And

And if a bill be for redemption after, the defendant shall plead, or demur to it. *Ca. Ch.* 102. 1 *Ch. R.* 184. *Jenner v. Tracy*, P. 1731, *Belch v. Harvey*, M. 1736, 3 P.W. 288.

Yet, redemption of a mortgage after 20 years is allowed in case of infancy or coverture, &c. which are excepted by the statute. 2 *Vent.* 340. 1 *Ch. R.* 193, 4. *Jenner v. Tracy*, P. 1731, *Belch v. Harvey*, M. 1736, 3 P.W. 288.

[So, after 20 years, if during that period mortgagee has treated it as redeemable by keeping accounts upon it. 2 *Ves. jun.* 84.]

[Equity of redemption of a term cannot be taken in execution. *Lyfster v. Dolland*, 1 *Ves. jun.* 431. 3 *Bro. C. C.* 478. S. C.]

[Husband and wife, seised in fee in right of the wife, mortgage by fine, and afterwards convey the equity of redemption by lease and release to the mortgagee; he having continued in possession, as complete owner, for more than 20 years during the life of the husband tenant by the curtesy, the heir of the wife held to be barred of his equity of redemption by lapse of time. *Corbett v. Barker*, 1 *Anstr.* 138.]

[On re-hearing, decree reversed, and redemption directed. 3 *Anstr.* 755.]

[On a bill to redeem, the mortgagee cannot object that the bill does not state a valid legal conveyance to him. *Roberts v. Clayton*, 3 *Anstr.* 715.]

[After the disability removed, ten years should be the rule in equity, as it is in the proviso in the statute of limitations. *Per Talbot C.* *Jenner v. Tracy*, P. 1731, *Belch v. Harvey*, M. 1736, 3 P.W. 218.]

[After 25 years' possession, the court will order a redemption on defendant's consent, but not otherwise. *Proctor v. Oates*, H. 1740, 2 *Atk.* 140.]

[Coverture is no excuse for not redeeming a mortgage; for if a woman becomes afterwards discovert, the statute of limitations will run from that time; even tho' she marries again, it will run after the second marriage. *Anon. T.* 1742, 2 *Atkyns*, 333.]

[Nor, tenancy by the curtesy; for it is of no consequence to the mortgagee who has the equity of redemption; if they do not make use of it they shall be barred. *Ibid.*]

[But if 17 years after the mortgage, and 12 years before filing the bill to redeem, the mortgagor's agent settles an account in order to pay off the mortgage, it will save the redemption. *Ibid.*]

[If a man, by will or any other deliberate act, take notice that he is only mortgagee, such circumstances will take the case out of the rule that a mortgagor shall not redeem after 20 years. 2 *Brown.* 399.]

[But if without such circumstances he claim by better title in his answer, the rule shall take place. *Id.* 397, 8, 9.]

So, redemption shall be allowed, before the day for payment fixed at many years distance. 1 *Ver.* 184. 394.

So, redemption of an estate, extended upon a judgment by *elegit*, is allowed at any time, tho' a prior bill for redemption is dismissed. 1 *Ver.* 397, 8. 468.

[If A. and his wife, by lease and release and fine, convey two messuages to B. and his heirs, till he shall receive by the rents 50 l. and interest, and then to the use of A. for life, remainder to the wife for life, &c.; there never can be a forfeiture; and no bar arises from length

length of time, the mortgagee being only in the nature of tenant by elegit. *Yates v. Hambly*, T. 1742, 2 *Atkyns*, 360.]

Allowed upon a mortgage after a possession for sixty years, where the mortgager agreed that the mortgagee should hold till he was satisfied. 1 *Ver.* 418. *Eq. Abr.* 314.

After 40 years, and three or four descents, where there was infancy or coverture for the greatest part of the time, and an account with the mortgagee, and bill for foreclosure. 2 *Ver.* 377. *Eq. Abr.* 314.

So, redemption was allowed, after a fine by the mortgagee, and non-claim. 1 *Ver.* 132.

So, after a foreclosure against the mortgagor, upon a prior mortgage, and a purchase since the decree. *R. Ch. R.* 408.

So, redemption was allowed, after release of the equity, where the estate was of greater value, and therefore probable that the release was upon other trusts, which did not then appear. *Ca. Ch.* 107.

But after the equity foreclosed against the mortgagor, a remote remainder-man shall not redeem an ancient mortgage, tho' no party to the decree of foreclosure. *R. Ca. Ch.* 220.

So, after a mortgage, &c. for many years, no redemption shall be against a purchaser, and a possession for 30 years. 1 *Ch. R.* 144, 5.

[If *A.* agrees with *B.* for the purchase of certain messuages, and *A.* desires *C.* to advance the purchase-money, the premises to be conveyed to *C.*, but redeemable by *A.* on paying *C.* principal and interest, and *C.* pays the money, has the conveyance, and continues in possession for upwards of 30 years without an account being demanded; *C.* is entitled to an absolute estate. *Yates v. Hambly*, T. 1742, 2 *Atkyns*, 360.]

So, where 60 years were elapsed, and tho' a redemption was attempted at the end of 30 years, there was acquiescence for 30 years after, no redemption was allowed. 2 *Ver.* 418. *Eq. Abr.* 314.

[If a lease for 60 years is granted as a collateral security for money secured by a recognizance also; at the expiration of the term the inheritance shall be re-conveyed on payment of what is due. *Tomes v. Conset*, M. 1745, 3 *Atkyns*, 261.]

[The assignee of the equity of redemption, tho' for a very small consideration, shall redeem, if the bill is brought to redeem within 15 years of the time when it appeared plainly to be a mortgage; but he shall be confined only to surcharge and falsify, and interest shall be allowed at 5 per cent. *Anon. P.* 1746, 3 *Atkyns*, 313.]

[If *A.* conveys lands to *B.*, and there is an agreement by separate articles, that on *A.*'s repaying the money advanced, and 50 *l.* for improvements that *B.* might make, *B.* shall re-convey; *A.*'s son may redeem 12 years afterwards, in one year after coming of age. *Baker v. Wind*, 1748, 1 *Ves.* 160.]

(4 A 6.) Upon what Terms one may redeem.

[If oppression appears in the mortgagee, the court will direct in the decree every thing to be taken most strongly against him. *Misford v. Featherstonhaugh*, T. 1752, 2 *Ves.* 445.

If a mortgagor redeems, he ought to pay principal, interest, and costs.

[Mortgagee

[Mortgagee takes a bond from the assignee of the devisee of mortgagor for the arrears of interest then due, and gives a receipt; the bond is unpaid; the interest is still secured by the mortgage. *Hardwick v. Mynd*, 1 *Anstr.* 111.]

[Bill against the devisee of mortgaged premises by the heir of mortgagor for discovery and redemption, charging acknowledgments, that the estate was held in mortgage, and that accounts had been kept: plea of possession for fifty years under conveyances from the mortgagee; ordered to stand for an answer. *Lake v. Thomas*, 3 *Ves. jun.* 17.]

If husband and wife, in right of wife, by fine make a mortgage for 300 *l.*, and 200 *l.*, part thereof, is afterwards repaid, and then the husband borrows of the mortgagee more money, which is indorsed upon the mortgage; tho' no other fine was levied, yet the heir shall not redeem without payment of the whole; for the mortgagee has a right in law, and has equity for all the money. *R.* 2 *Ca. Ch.* 98. *Vide Prior Incumbrance*, *post.* (4 *A* 10.)

If a man in remainder after an estate for life redeems a mortgage, he shall pay only two-thirds. 1 *Ver.* 404. *Ca. Ch.* 271.

Tenant for life shall pay two-fifths, and he in remainder three-fifths. 2 *Ver.* 267.

But if he in remainder does not pray a redemption till the life determines, he shall pay the whole, having interest abated during the life. *R.* 1 *Ver.* 404.

If he, who has an equity of redemption only for life, will redeem, the mortgagee ought to exhibit a cross bill, that the land may be sold, and after payment of the mortgage, &c. the surplus be divided amongst the tenant for life and them in remainder. 2 *Ver.* 117.

If a mortgagee enters upon forfeiture of the mortgage, he shall be allowed upon his account, when the mortgagor redeems, interest for the interest due at his entry. *D. Ca. Ch.* 258.

So, if an account be stated between the mortgagor and mortgagee, interest shall be allowed for the whole due upon the account. *Ch. R.* 409. *Dub.* 2 *Ver.* 392.

So, an assignee of a mortgage shall be allowed interest for all interest due at the time of the assignment. *R. Ca. Ch.* 68. 258. *Dub.* 1 *Ver.* 169. *Vide ante*, (3 *S* 3, 4.)

So, if the annual rent does not satisfy the interest, the mortgagee shall be allowed interest for the residue of the interest covenanted to be paid; for he might have recovered damages at law for the non-payment. 1 *Ver.* 194.

So, he shall be allowed all costs expended at law in defending his mortgage against an entail. *R.* 2 *Ver.* 536.

A mortgagee shall be charged only for profits received by him, not for profits which he might have received. *Ca. Ch.* 258. *Vide ante*, (2 *A* 5, 6.)

A mortgagee shall account for all profits by him received, tho' he had possession by agreement from the time of the mortgage, and shall not set the profits in balance against the interest. 1 *Ver.* 477.

Shall not have the benefit of a collateral agreement to sell him so much of the land for such a price; for he can require his principal and interest only. 2 *Ver.* 520.

[The court will not allow a mortgagee more than principal and interest,

terest, tho' there was a private agreement that he should have an allowance for receiving the rents. *French v. Baron, H. 1740, 2 Atkyns, 120.*]

If a mortgagee commits waste, pending the account upon a bill for redemption, the court upon *affidavit* and motion will direct the defendant to deliver possession to the plaintiff immediately, tho' he be a pauper, upon security to pay the whole due upon the account, when determined. 2 *Ver.* 392.

If an advowson be appendant to a manor in mortgage, and upon avoidance the mortgagee presents, an injunction shall be granted to stay his proceeding, if the mortgagor tenders payment of principal, interest, and costs. 2 *Ver.* 401.

Tho' the mortgagee has a bill to foreclose, and the mortgagor no bill to redeem, for until decree of foreclosure, the mortgagee is but a trustee for the mortgagor, as to the advowson. *R. 2 Ver.* 401. 550.

If the mortgage was of an estate in fee and for life, the mortgagee shall account for all profits received during the life, tho' he lives for many years, and not only for the value of the estate to be sold; tho' the fee is not sufficient for the money due at his entry, and tho' the redemption was, not within 20 years. *R. cont. but that reversed in Parl. Ca. Ch.* 109.

If a mortgagee has judgment in ejectment, and afterwards refuses to take execution, he shall answer for the profits, as in the case of a voluntary default. 1 *Ver.* 258.

So, if the mortgagor becomes bankrupt, and the mortgagee, to prevent the assignees getting possession on an ejectment by them, assists the mortgagor with his mortgage, to detain the possession, and yet does not enter; he shall answer for the profits from the delivery of the declaration in ejectment. *R. 1 Ver.* 267.

So, if the mortgagee, after judgment in ejectment and possession, permits the mortgagor to take the profits to the prejudice of other incumbrancers, who would redeem him, he shall be charged with the profits from the time of his entry. 1 *Ver.* 270.

If a mortgagee covenants to make a lease for four years, and then the mortgagor redeems, he shall not be subject to the lease unless where there was a necessity for a lease; for no incumbrance by the mortgagee binds the mortgagor. *R. Mod. Ca. in Eq.* 1.

[The mortgagee of an estate for lives may renew them as they fall in, (tho' he cannot compel the mortgagor to do it,) and it shall be added to the mortgage-money. *Lucam v. Mertins, M. 17 G. 2 Wilf.* 34.]

So, a mortgagee shall not have the benefit of a covenant for redemption, where he has both parts of the indenture in his hands, and does not give notice, or make claim of the covenant, before a contract for sale. *Mod. Ca. in Eq.* 2.

[A mortgagee in possession shall not be obliged to quit the estate to a purchaser, till he pays him principal, interest, and costs. *Davy v. Barker, P. 1737, 2 Atkyns, 2.*]

If the purchaser of an equity of redemption upon an old extent will redeem against A., who hath purchased the extended interest; A. shall account for the profits from the time of his purchase only, and the profits before shall be balanced against the interest. 2 *Ch. R.* 392. [If

[If *A.* a mortgagee, brings bill to redeem against *B.* a judgment creditor who has one subsequent and two prior judgments, of which he has taken an assignment, in the same estate, by desire of the mortgagee, and on a decree for sale *B.* had been reported best purchaser; *A.* shall pay him interest for the accumulated sum paid for the judgments, 5 l. *per cent.* on the principal, and 4 l. *per cent.* on the interest, and *B.* shall account for the profits received on the three judgments. *Aspenhurst v. James*, H. 1745, 3 *Atkyns*, 270.]

If *A.* exhibits a bill to redeem a mortgage, he shall not encumber the account with the breach of collateral covenants, in the lease of a colliery. 2 *Ver.* 462. 520.

When a man shall not redeem one mortgage without redeeming another security, *vide post.* (4 A 10.)

[A mortgagor may redeem without paying off a bond-debt; but the heir at law must, because the estate becomes assets. *Morret v. Palke*, T. 1740, 2 *Atkyns*, 52.]

If the mortgagor tenders the money at the day, the mortgagee shall not have interest for it from the time of the tender and refusal, upon affidavit that he had not made any benefit of it. 2 *Ca. Ch.* 206.

[If there are covenants on the part of the mortgagee in the re-assignment, he may refuse to take the principal and interest tendred till he can advise whether he can safely execute; therefore the deed should be left with him, and a time appointed to pay after he may have advised. *Wiltshire v. Smith*, P. 1744, 3 *Atkyns*, 89.]

So, after forfeiture of a mortgage, if the mortgagee upon discourse refuses acceptance, and afterwards the mortgagor makes a tender at his house; tho' the mortgagee was not present at the tender. *R. Ca. Ch.* 29.

So, generally, he shall not have interest upon interest. 1 *Ver.* 194. *Vide ante*, (3 S 3, 4, 5.) *Vide supra*.

If *A.* mortgages a house, which by accident becomes deficient to satisfy the money, and afterwards is a bankrupt; the house shall be sold, and the mortgagee shall come in as a creditor for the money not satisfied. *Eq. Abr.* 312.

If the mortgagee has devised the lands to *A.* for life, and afterwards to *B.* in fee, *B.* shall have a proportion of the money, if the mortgage is redeemed. 1 *Ver.* 70. *Vide ante*, (3 V 6.)

And the usual proportion is, one-third to the tenant for life, and two-thirds to him in fee. 1 *Ver.* 70.

[If a man devises his estate, already mortgaged to *A.* in tail, the reversion in fee to the right heirs of her brother, of whom she is one, and *A.* levies fine, and conveys to *B.* by lease and release, in consideration of money paid, and of paying 600 l. on the mortgage, and paying legacies charged on the estate, and afterwards marries *B.*, and previous thereto the estate is settled on *B.* for life, then to *A.* for 99 years, if she so long live, then to the issue of the marriage, with remainder over; and afterwards *B.* takes assignment of the mortgage, and receives the rents, and continues in possession on *A.*'s death; the reversioners may redeem on paying their share and interest on the mortgage, and on the legacies paid, from the time of *A.*'s death only. *Amesbury v. Brown*, T. 1750, 1 *Ves.* 477.]

[By *stat. 7 G. 2. c. 20. s. 1.* if an action be brought in any of the courts at *Westminster*, or in the great sessions, or in the superior courts

courts of *Chester, Lancaster, or Durham*, or any bond for securing the payment of money borrowed on mortgage, or for performance of covenants, or an action of ejectment be brought for the recovery of mortgaged premises in any of these courts by the mortgagee, &c. and no suit of foreclosure be depending in a court of equity; then if the person, &c. having a right to redeem, pay to the plaintiff, or in case of his refusal to accept, bring into court the principal and interest due on such mortgage, and all costs, (the whole to be ascertained by the court or officer appointed by the court,) the money so paid or brought into court shall be taken as a full satisfaction and discharge of such mortgage, and the court may, by rule or order of court, compel the mortgagee, &c. at the costs of the mortgagor, &c. to re-convey, &c. and deliver up all deeds, &c. relating to the title of such mortgaged premises.]

[And by *f. 2.* on bills of foreclosure being filed in any court of equity, the court, on application made by the defendant, &c. having a right to redeem, &c. and on his admitting the plaintiff's title, may, before hearing, make such order or decree as might have been made if the cause had been regularly brought to hearing; and all parties to such suit shall be bound by such order or decree so made, to all intents and purposes as if such order or decree had been made by such court, at or subsequent to the hearing of such cause or suit.]

[Tho' a decree be made on motion by virtue of this cause, yet from the latter words of it, such decree cannot be discharged on motion. *1 Brown, 515.*]

[But this act shall not extend to cases where the right of redemption is controverted, or the money due not adjusted, or to prejudice any subsequent mortgage. *f. 3.*]

[A reference under this act must proceed on admission of the principal and interest due on the mortgage; and the master cannot admit evidence. *Hewson v. Hewson, 4 Ves. jun. 105.*]

Vide post. (4 A 10.)

(4 A 7.) When a Mortgage shall not be redeemed.

By the *st. 4 & 5 W. & M. 16.* if any mortgage land for a valuable consideration, and give not notice in writing under hand, before executing it, of a former mortgage on all or part of the same land, such second mortgagee shall hold as an absolute purchaser, freed from equity of redemption, in respect to the mortgagor, his heirs, executors, administrators, or assigns.

So, if he gave not such notice of a former judgment, statute or recognizance, given for security of money, or like valuable consideration, unless on notice thereof under hand and seal of the mortgagee, attested by two witnesses, the mortgagor discharge such former incumbrance in six months after.

So, if such second mortgagee assigns to another, it continues irredeemable. *2 Ver. 590.*

If *A.*, who has a subsequent mortgage, redeems the second, he also shall hold, without redemption. *Ibid.*

But if *A.* by artifice obtains a second mortgage, he shall not take any benefit of the statute, tho' he had no notice of the prior mortgage. *R. 2 Ver. 590.*

[If relief is prayed where a mortgagee is party, it is praying to redeem;

redeem; if on reference they do not redeem, the court will dismiss the bill, which is equivalent to a foreclosure. *Cholmley v. Countess of Oxford*, H. 1741, 2 *Atkyns*, 267.]

[If there is a decree of foreclosure in common form, and the money is not paid, and a long time elapses, but no final order of foreclosure; this is a good defence to a bill for redemption, but not by way of plea. *Senhouse v. Earl*, T. 1752, 2 *Ves.* 450.]

[If *A.* transfers 2500*l.* *East India* stock to *B.* to secure 2000*l.* and interest, and *B.* executes a *deceazance*, and 21 years afterwards the representative of *A.* brings bill, the court will not decree a redemption. *Lockwood v. Ewer*, P. 1742, 2 *Atkyns*, 303.]

(4 A 8.) Assignment of a Mortgage.

[Assignment of a mortgage without the privity of the mortgagor; the assignee takes subject to the account between the mortgagor and mortgagee. *Matthews v. Walwyn*, 4 *Ves. jun.* 118.]

If a mortgagee assigns the land mortgaged to another after forfeiture, the mortgagor shall be admitted to a redemption upon a bill against the mortgagee and his assignee. *R. Ca. Ch.* 3.

So, upon a bill against the mortgagee only; for the assignee pleaded outlawry in the plaintiff, by which he was barred as against him, and the cause was heard against the mortgagee only. *Ca. Ch.* 3.

And such assignment shall be taken as a new mortgage at that time. *Ibid.* 218.

If the mortgagee assigns without the consent of the mortgagor, it may be decreed, that the mortgagee account for all the profits before and since the assignment. *R. Ca. Ch.* 3.

If a mortgagee assigns, an account between him and the assignee does not bind the mortgagor; but a master of the court ought to examine how much was then due, and how much paid. *Ibid.* 68.

But the mortgagor, if he redeems, ought to pay as much as was *bonâ fide* paid by the assignee, and interest for it. *Vide ante*, (4 A 6.)

So, if a man purchases an assignment of a mortgage at an under value, he shall have the benefit of it; and the mortgagor shall not redeem against him without paying the whole money due upon the mortgage and interest for it. 1 *Sal.* 155. 1 *Ver.* 476.

So, if *A.* mortgages for so much, to be repaid within five years, and interest annually, if the mortgagee assigns before the five years are expired, and after forfeiture by non-payment of the interest; interest shall be paid for the sum paid by the assignee, before the mortgagor can redeem. *R. 2 Ver.* 135.

If a mortgage be to *A.*, his executors, and assigns for years; the mortgagor shall be tenant at will to all the assigns, as well as to the first mortgagee. *Skin.* 424. *Vide Estates*, (H 1.)

(4 A 9.) A Mortgage belongs to the Executor or Administrator of the Mortgagee.

If a mortgage is redeemed, the money ought to be paid to the executor, and not to the heir of the mortgagee; for it is a part of the personal estate. *R. Ca. Ch.* 88.

So, to the administratrix. *R. Ca. Ch.* 52. 137. 1 *Ver.* 4. 412. *Vide in Condition*, (G 2.)

Tho' the mortgage be in fee, and the condition be for payment to the mortgagee, his heirs or executors, and tho' the executor does

not want assets, and there be no covenant for payment of the money. *Cont.* 1660, 1 *Ch. R.* 181. *Cont.* 11 *Car.* 1. *Dub.* 19 *Car.* 2. *Ca. Ch.* 88. *R.* upon solemn debate, 28 *Car.* 2. *Per Finch*, *Ca. Ch.* 285. *D.* 2 *Ca. Ch.* 52. *R.* 2 *Ca. Ch.* 187. 1 *Ver.* 412. 1 *Ch. R.* 254. 279. 2 *Ch. R.* 39.

Whether the mortgage be forfeited or not forfeited at the death of the mortgagee. *R.* 33 *Car.* 2. 2 *Vent.* 351. 2 *Ver.* 193.

And if the heir exhibits a bill for foreclosure, without the executor or administrator, it shall be dismissed on demurrer. *R. Ca. Ch.* 51. 2 *Ca. Ch.* 29.

And if the money is paid to the heir, upon a bill brought by the executor, the heir shall be decreed to pay it to him. *R.* 31 *Car.* 1. 2 *Vent.* 348.

Otherwise, if payment was made to the heir at the day limited by the mortgage. *Semb.* 2 *Ca. Ch.* 221.

So, before payment, the executor or administrator, upon a bill against the heir and mortgagor, may have a decree for payment to him. *R.* 2 *Ca. Ch.* 221.

So, an executor or administrator upon a bill, may oblige the heir to convey to him. *R.* 2 *Ca. Ch.* 50. 1 *Ver.* 413.

So, if the mortgagor release the equity of redemption to the heir of the mortgagee, his administrator shall have the benefit of the mortgage, tho' there be assets sufficient. 2 *Ver.* 193.

So, an executor or administrator shall have the mortgage, tho' the mortgagee devises his lands in *B.* where part of the mortgaged lands lie, but not all, to *A.*; for the devisee does not take the mortgage. *R.* 2 *Ca. Ch.* 52.

So, an executor or administrator shall have the mortgage, tho' the usual time for foreclosure be elapsed. 2 *Ver.* 193.

Tho' there were two descents to the heir since the mortgagee entered, and the mortgagor refused to redeem; if the equity is not foreclosed or released. 2 *Ver.* 367.

So, the husband shall have the mortgage of a copyhold to his wife and her heirs, and not the heir of the wife. *Dub.* 1 *Ver.* 170.

So, if the mortgagee devises the lands in mortgage to *A.* and the heirs of his body, remainder to *B.* and afterwards the mortgagor pays the money to the executor; *A.* shall have all the money, and not the interest only. *R.* 1 *Ch. R.* 129.

But if a mortgagee, after a possession of seven years, sell to *A.* and his heirs; the estate goes to the heir of the purchaser, and shall not be taken as his personal estate. 1 *Ver.* 271.

So, if a mortgagee in fee has possession, and so much time is elapsed, that the estate is not redeemable, it goes to his heir. *Semb.* 2 *Ver.* 193.

So, if a mortgagee in possession devises or conveys to a daughter and her heirs, and she marries and dies without issue, the husband shall not have the money due upon the mortgage, but the land shall descend to the heir of the wife. *R.* 2 *Ver.* 583. *Eq. R.* 2.

(4 A 10.) Prior Incumbrance.

If a mortgagee advances more money upon an old mortgage without notice of a marriage settlement intervening, it shall be allowed,

lowed, notwithstanding such settlement. *R. Ca. Ch.* 119. *Vide ante*, (4 A 6.)

So, if a mortgagee, without notice of a prior incumbrance or mortgage, purchases, after notice thereof, a mortgage precedent to the second mortgage or incumbrance, he shall hold against the *puisne* mortgage and incumbrance, until the first and also the third mortgage is discharged. *Per Hale in Chanc.* 2 *Vent.* 338. *Ca. Ch.* 150. 162. *R. Ca. Ch.* 201. *R.* 2 *Ca. Ch.* 35. *R.* 1 *Ver.* 187. [1 *Term Rep.* 755. 763.]

[A suit depending between incumbrances on other estates of mortgagor's, and his judgment creditors and his representatives known to a purchaser, is notice. *Morret v. Paske*, *T.* 1740, 2 *Atkyns*, 52.]

[If a subsequent purchaser or mortgagee has notice of a former purchase or incumbrance, he shall not avail himself of an assignment of an old outstanding term, prior to both, in order to get a preference; but if he had no notice of such prior purchase or incumbrance, and has the first and best right to call for the legal estate; then if he gets an assignment of it, a court of equity will not deprive him of his advantage; if a second mortgagee lend his money upon an estate, upon which there is an old outstanding term, and he has notice at the same time of a certain incumbrance prior to his own, the prior incumbrancer has the best right to call for the legal estate, and to satisfy himself of any other incumbrances upon the estate, altho' such other incumbrances were not known to the second mortgagee at the time he advanced his money. 1 *Term Rep.* 763. *Willoughby v. Willoughby*.]

[Where there is a prior mortgagee, who has a *puisne* incumbrance, a second mortgagee shall not redeem the prior, without redeeming the *puisne* at the same time, because the legal estate is in the first mortgagee; and this court will not take away that benefit from him, provided he had no notice of the second at the time he brought in the *puisne* one. *Id. ibid.*]

[Where a third mortgagee, pending a suit by the second against the first and third mortgagor, buys in the first mortgage, he, by this, obtains a priority, and shall be paid his whole money before the second mortgagee. 1 *Brown*, 63.]

[But a *puisne* incumbrancer cannot take in a first incumbrance, and gain a preference to a second, after a decree with direction to settle the priorities. 2 *Ves.* 571. 3 *Atk.* 809.]

[The prior and the *puisne* incumbrance cannot be tacked, unless they are the same person in the same right. *Morret v. Paske*, *T.* 1740, 2 *Atkyns*, 52.]

[A mortgage may be tacked to a judgment, because the judgment creditors might bring ejectment on *elegit*, and have the legal estate. *Ibid.*]

[An agent, trustee, heir at law, or executor, purchasing a *puisne* incumbrance, shall, as against another incumbrancer, be paid no more than he gave for it; otherwise of a prior creditor, tho' he gave not the full value. *Ibid.*]

[If a prior incumbrancer has also a bond, the bond shall be postponed to all incumbrances by mortgage, judgment, or statute-staple. *Ibid.*]

[*A.* gives judgment in 1698 for 600*l.* to *B.*, in 1707 they settle accounts, and find 420*l.* due on the judgment, and *A.* gives *B.* a mortgage for that sum, as collateral security to judgment; in 1716 *C.* takes assignment of mortgage, reciting 90*l.* (the consideration) to be the full value of the estate; *C.* is in possession of another mortgage in 1688; *C.* shall not tack the two mortgages; yet the latter shall have relation to the judgment, and *C.* receive the sum due on it prior to creditors after 1698, and for the money due since 1707, only prior to creditors after 1707.* 2 *Atkyns*, 52.]

[A prior judgment creditor getting a subsequent mortgage cannot tack it. *Anon. T.* 1755, 2 *Ves.* 662. *Sed qu. Vide ante, Morret v. Paske.*]

[It is a settled rule, that a judgment may be tacked to a prior mortgage. *Shepherd v. Titley, T.* 1744, 2 *Atkyns*, 348.]

[If *A.* mortgages his estate to *B.* and then the same to *C.*, and afterwards sells to *D.* a fee-farm rent issuing out of *D.*'s lands, being part of the mortgaged premises, and then *B.* and *D.* agree, that on *B.*'s being paid his mortgage money, he will convey the fee-farm rent to *D.*, who agrees in that case not to sue *A.*, yet *C.* shall be entitled to redeem *B.* and have an assignment of his whole security, and thereby to compel *D.* to redeem him as to the fee-farm rent. *Ibid.*]

If *A.* lends 100*l.* to *B.* upon a judgment, and *C.* lends 300*l.* to *B.* upon a mortgage, and a term, before the loan by *A.* was assigned to *A.*, *D.* and *F.* to attend the inheritance, and *C.* obtains an assignment of the term from *B.* and *F.*, and afterwards *A.* having notice thereof, takes an assignment from *A.*, *B.* and *D.*, to *E.* in trust for *A.*; he shall be preferred as to two parts of the term. *R.* 2 *Ver.* 525.

If *A.* mortgages to *B.* and afterwards without *B.* to *C.*, and afterwards with *B.* to *D.* and others; *C.* shall be preferred to *D.* and the others. 2 *Ver.* 574.

If the cognisee of a statute agree with the cognisor for part of the land in satisfaction; he shall protect his purchase by the statute against a *mesne* incumbrance. *Semb. Ca. Ch.* 36.

So, if *A.* has a mortgage of a manor and land, *B.* a second mortgage, and *C.* has a mortgage of the land, and afterwards purchases the mortgage of *A.*; he shall hold the manor as well as the land, till he is satisfied both. *R. two J. cont. Ca. Ch.* 202.

So, if *A.* mortgages the moiety of a manor to *B.* and the whole to *C.*, and afterwards the whole to *D.*, and *D.* purchases the mortgage of the moiety to *B.*; he shall hold that moiety against *C.* till he is satisfied the money paid to *B.*, and also his own money borrowed upon the mortgage of the whole to himself. *R. per Chanc. with Hale and Rainsford, 2 Vent.* 339.

But the purchase of the first mortgage protects the third mortgage only for the moiety of the manor. *R. 2 Vent.* 339.

So, if a purchaser or second mortgagee obtains a statute, &c. prior to the first mortgage, or before his purchase, he shall have the advantage. 1 *Ver.* 52.

And a receipt for the money lent on the second mortgage is sufficient, without proof of actual payment. *R. 2 Ver.* 279.

So, if a second mortgagee purchases a statute or judgment prior to the first mortgage, he shall be compelled by the first mortgagee to account

account only for the penalty of the statute, and to the extended value of the land, till he is satisfied the money due upon the statute, and his second mortgage: for if a cognisor, at common law, sue a *scire facias ad computand.*, he shall not recover, if the cognisee be not answered the penalty of the statute by the extended value of the land; tho' in equity he shall recover, if the cognisee is answered as much as is due upon the statute by the true value of the land; but the second mortgagee, having equity for him, shall not account in Chancery, but as a cognisee at common law. *R. 2 Vent. 338. Ca. Ch. 167. 1 Ver. 50. Hard. 318.*

But if the statute extends to more land than the second mortgage, if first mortgagee pays the money upon the statute in proportion to the other land, the other land shall be discharged: and such proportion may be determined by the court. *Semb. 2 Vent. 339. Vide Ca. Ch. 167. R. That he shall have all the land extended, until the statute and last mortgage are both satisfied. Two J. cont. Ca. Ch. 202.*

And if the second mortgagee purchases a statute or judgment, &c. prior to the first mortgage, he may plead it to a bill by the first mortgagee for discovery of his title. *2 Vent. 337. R. Ca. Ch. 150. 164.*

If a man purchases a lease for a valuable consideration, without notice of a jointure, and afterwards gets a prior judgment and extends it, he shall hold against the jointress, until he is satisfied by the extended value. *Ca. Ch. 247.*

But if he takes a judgment at first, and after the jointure takes a lease of the husband for a valuable consideration, he shall not hold against the jointress by the extended value, if the judgment is satisfied by the true value. *R. Ca. Ch. 247.*

If *A.* has an annuity out of the manor of *B.* upon which *C.* has a mortgage, and *D.* a subsequent mortgage, reversion to *F.* in fee; *C.* without notice of the mortgage to *D.* pays 900*l.* to *F.* and *A.* for to purchase of the annuity and reversion of which only 500*l.* to *A.*; he shall hold the annuity against *D.* till the 900*l.* is satisfied. *R. 2 Ca. Ch. 20.*

If husband and wife by fine mortgage the land of the wife for 400*l.*, and the husband pays 200*l.* and afterwards re-borrows as much of the mortgagee; the heir of the wife shall not redeem, without payment of the whole. *1 Ver. 41. 2 Ca. Ch. 98. Vide infra.*

If a second mortgagee purchases a prior incumbrance, after a bill against him by the first mortgagee, it shall be allowed. *R. 2 Ver. 29. 81.*

But if a mortgage is made by tenant for life, upon affidavit that he has the fee, and after his death the mortgagee takes another mortgage from the son, who had the inheritance, for other money advanced to the son, and then the son makes a mortgage to *B.*, *B.* shall redeem on payment of the money advanced to the son, without paying the first mortgage made by the father, who had not a title. *R. 2 Ca. Ch. 23.*

Otherwise, if a mortgagee by a good title advances more money without a fine, by which there is a defective title as to the second mortgage, yet he shall hold till both sums are paid; for he has a title

title at law, and the same equity for the money as the heir for the land. *R. 2 Ca. Ch. 98. Vide supra.*

So, if the mortgagee advances more money to the mortgagor on bond, by which he binds himself and his heirs; the heir cannot redeem, without paying the money on the bond as well as on the mortgage. *2 Ca. Ch. 164. 1 Ver. 244, 245. 2 Ver. 177. [Vide 2 Vef. jun. 376.]*

[A mortgagee, who is also a bond creditor, may tack his bond to his mortgage as against the heir, but not as against intervening incumbrancers of a superior nature. *Powis v. Corbet, T. 1747, 3 Atkyns, 556. Lowthian v. Hesel, 3 Bro. C. C. 162.*]

Not in preference to other creditors under a trust created by the will of the mortgagor for payment of debts. *Hemes v. Bance, H. 1747, 3 Atkyns, 630. See also Hamerton v. Rogers, 1 Vef. jun. 513.*

So, tho' the bond be prior to the mortgage. *2 Ch. R. 247.*

So, if the assignee of a mortgage has money on bond due to him from the mortgagor. *2 Ch. R. 360.*

So, mortgage to *A.* for years, afterwards mortgage to *B.* in fee, *A.* assigns to *C.* who advances more money, and takes a conveyance of the inheritance, with agreement that the term should be kept on foot as additional security, but it is not assigned to a third person; *C.* shall be paid his whole money, for the term did not merge, the grant being void, as the grantor had nothing in him. *Hasket v. Strong, H. 12 G. Str. 689.*

[If *A.* gives notes to *B.*, expressing that the money received is to be secured by mortgage on his estate at *S.*, which estate he had before mortgaged to *C.*, and *B.* buys in a prior mortgage; he shall protect himself against *C.* for the notes as well as the first mortgage. *Matthews v. Cartwright, T. 1742, 2 Atkyns, 347.*]

So, if *B.* makes two mortgages to *A.* and one is deficient, he shall not redeem the other if he will not redeem both. *1 Ver. 245. 2 Ver. 207. 286.*

[So, where two separate mortgages of different estates are made to the same person, a purchaser of the equity of redemption of one of them, cannot redeem the mortgage upon that estate only; he must redeem both. *Ambler, 733*]

A purchaser of a prior incumbrance shall not have advantage of it for securing another debt, if he had not the mortgage or purchase of the land without notice, before his purchase of the incumbrance. *R. Ch. R. 409.*

If the executor of *B.* mortgages for the term of 1000 years to *A.* to whom 500*l.* is due from *B.*, the executor of *B.* shall not redeem without payment of the 500*l.* due from *B.* to the mortgagee, tho' *B.* had personal assets sufficient for payment. *1 Ch. R. 249.*

[But if a devisee in trust for payment of debts, mortgages the estate to a creditor for money lent him, he cannot retain for the old debt also, but for that shall come *pari passu.* *Itbill v. Bene, H. 1748, 1 Vef. 215.*]

So, if a statute is inrolled after the time elapsed, by order of court, whereby a judgment given since the date is over-reached; if the land

land be in mortgage, whereby neither the statute nor judgment touch the estate at law, the judgment shall be preferred. *Semb.* 1 *Ver.* 234.

If a mortgagee gets a prior incumbrance for a less sum, he shall be allowed, upon his account, the whole due upon it. 1 *Ver.* 49. 336. *R.* 2 *Ver.* 66. *Vide supra.*

So, if he gets a prior statute, &c. and extends it after it was satisfied, the mortgagor shall not be allowed relief without payment of the mortgage. *R.* 2 *Ver.* 30.

Otherwise, if an heir or a trustee purchases it at an under value. 1 *Ver.* 49.

So, if a mortgagor makes a settlement for a jointure, and afterwards the mortgagee, without notice of the jointure, advances more money; he shall hold against the jointress till both sums are paid. *Eq. Abr.* 311.

[If land subject to the payment of 500*l.* and the trustee for it is in possession for several years, and the land is mortgaged; the mortgagee shall not be affected by this charge, for he may say the land has borne its burthen. *Moore v. Moore, T.* 1755; 2 *Ves.* 596.]

So, if a deed being a security to *A.* for 200*l.* is deposited with him for 300*l.* more borrowed of *A.* as a pledge, *A.* shall not be compelled to surrender the deed till payment of the 300*l.* as well as of the 200*l.* *R. Ca. R.* 11.

If plate and jewels are pledged to *A.* for 200*l.* and within two days after are pledged by *A.* with other goods, to *B.* for 300*l.* who also lends to *A.* 50*l.* on promissory note, and *A.* becomes bankrupt; the pawner shall not redeem, without paying to *B.* the 50*l.* upon the note and the 300*l.* tho' no proof of agreement that the plate, &c. should be a pledge for the note; but the other goods shall be applied in the first place. *R.* 2 *Ver.* 691. 698. [*Vide* 2 *Ves. jun.* 378.]

But if the mortgage be of a reversion for 200*l.* upon condition to redeem, if he paid 40*l.* *per ann.* for eight years, he shall be allowed to redeem on payment of principal and legal interest. *R.* 1 *Ver.* 402.

[If tenant in special tail makes a mortgage and dies, and the remainder-man brings bill against an attorney who had the settlement, and the mortgagee, and the attorney by answer submits to produce it as the court shall direct, but before hearing delivers it to the mortgagee, the court will not compel the settlement to be delivered up. *Siddon v. Charnells, P.* 1734, *Bunb.* 298.]

[Where there is a subsequent mortgagee without notice, who has possession of the title-deeds, the first mortgagee shall not compel him to deliver them, but on paying his mortgage-money. *Head v. Egerston, P.* 1734, 3 *P. W.* 280.]

[A mortgagee of a reversion (not having the title-deeds) shall not be postponed to a subsequent mortgagee, (whose mortgage was made after the mortgagor came into possession,) who had the title-deeds; there being neither fraud nor gross negligence. 2 *Brown,* 650.]

[Where the legal estate is in a mortgagee, the subsequent securities being merely equitable, shall have priority according to their dates; as, where an elder brother being about to mortgage an estate on which

which his younger brothers and sister had charges, got them to join in the conveyance, and acknowledge a receipt of their portions, giving them an undertaking that he would grant them a subsequent mortgage, and enter into no prior security. He afterwards made a subsequent mortgage for money lent before on bond, and a fresh sum advanced. The claims of the younger children have priority in equity, and shall be preferred to the subsequent mortgage. *1 Brown, 353.*

[Personal securities were pledged for a specific debt; the debtor afterwards mortgages an estate in the *West Indies* to the creditor to secure a farther sum, and then pledges the same securities, with others to him, for the balance of an account; the transactions being distinct, redemption of the personal securities was decreed without discharging what was due on the mortgage. *At the Rolls, Jones v. Smith, 2 Ves. jun. 372. Decree reversed in Dom. Proc. 1798.*]

[*A.* deposited with plaintiff title-deeds of an estate, as a security for a debt; the defendant 14 years afterwards, on the eve of *A.*'s bankruptcy, took a mortgage from him, antedated, of the same estate, and had notice of the deposit, but avoided inquiring the purpose for which it was made: decree for the plaintiff. *Birch v. Ellames et al. 2 Anstr. 427.*]

[But where title-deeds were deposited as a security for money, and a creditor of the party expecting his immediate insolvency, took a mortgage of the same premises without either actual or constructive notice of the deposit, unless the deeds, not having been forthcoming, were notice; *Eyre C. B.* held the non-production of the deeds did not amount to notice, and that the legal estate should prevail against the deposit. *Plumb v. Fluit, 2 Anstr. 432.*]

[Devise for payment of debts; the trustees convey to *A.* for the purposes of the trust, *A.* mortgages to several persons, who have notice of the trust; the mortgages held good. *Hardwick v. Mynd, 1 Anstr. 109.*]

(4 A 11.) Foreclosure of a Mortgage.

[A bill of foreclosure is not necessary on a mortgage of stock, tho' it is necessary on mortgage of land. *Lockwood v. Ewer, P. 1742, 2 Atkyns, 303.*]

After a mortgage forfeited, the mortgagee may exhibit his bill against the mortgagor, to make redemption or to be foreclosed.

But he cannot foreclose before the mortgage is forfeited. *2 Vent. 365.*

So, he may exhibit a bill against *B.* who hath a second mortgage, tho' there are other incumbrancers, who are not made parties; and shall foreclose him and such as are parties, tho' not others who are not parties. *R. 2 Ver. 518.*

So, upon a bill to redeem, it may be decreed, that the mortgagor shall redeem, if he pays at such a day, and if he does not pay, that he be foreclosed.

[On a bill to redeem, and non-payment at the time appointed, it is a motion of course to dismiss the bill. *1 Brown, 581.*]

So, a bill may be by the heir to foreclose; but the executor afterwards shall have the money due upon the mortgage. *R. 2 Ver. 66, 70. Vide ante, (4 A 9.)*

And upon a bill for foreclosure the court only bars the equity of redemption, but does not decree the possession generally, nor mend the title of the plaintiff. *2 Ca. Ch. 244.*

Bill against an infant to redeem or be foreclosed; decree shall be, that he be foreclosed, if on an account now taken the infant do not pay the whole due within six months after his full age. *2 Ver. 392.*

[Infant foreclosed has six months after coming of age to shew cause against the decree, but shall not ravel into the account nor redeem, by paying what is reported due, but is only entitled to shew an error in the decree. *Ibid. Lyne v. Willis, P. 1730, 3 P. W. 352.*]

[*Feme-covert* entitled to equity of redemption, shall be absolutely foreclosed, tho' during coverture; and no day shall be given her or her heirs to redeem, after coverture determined. *Mallack v. Galton, H. 1734, 3 P. W. 352.*]

If bill be against a second mortgagee and an infant, who has the inheritance, there shall be a foreclosure against the second mortgagee, tho' the infant has six months after his full age. *2 Ver. 518.*

So, if the mortgage be of a reversion after an estate for life and for years, a foreclosure shall be decreed, to the intent that the mortgagee may sell for his money, if the mortgagor or his heir will not redeem. *R. 1 Ch. R. 32.*

If an annuity be granted with power of redemption, and a clause of entry for non-payment, and the annuitant enters; he may have a foreclosure that the annuity shall not be redeemed, nor that the land shall not. *R. 1 Ver. 209.*

But, after foreclosure and an absolute conveyance, the mortgagee shall be subject to a judgment, of which he had notice before the foreclosure. *R. 2 Ca. Ch. 171.*

Otherwise if he had not notice of it. *Ibid.*

So, after foreclosure, a redemption shall be admitted upon an express agreement subsequent, that the mortgage shall be redeemable. *Semb. Ca. Ch. 218.*

So, after a foreclosure, and a purchase afterwards made of the mortgagee, where there was a subsequent mortgage before the foreclosure, of which the prior mortgagee, at the time of the foreclosure, had notice. *R. Ch. R. 409.*

So, if the first mortgagee exhibits a bill against the second to redeem or to be foreclosed, and, after a decree for foreclosure, devises to the mortgagor; the second mortgagee shall redeem against the mortgagor, notwithstanding the prior decree for foreclosure. *R. 2 Ver. 235.*

So, a second mortgagee, &c. shall redeem after a decree for foreclosure against the mortgagor. *2 Ver. 601. 663.*

So, if creditors by bill pray a sale of an estate, and pending the bill the mortgagee obtains a decree for foreclosure, the creditors may afterwards redeem. *R. Eq. Ca. 15.*

But if a second mortgage redeems a prior after a foreclosure, the prior mortgagee shall be allowed all expences, (to be taxed as the bill of a solicitor,) which he was at in obtaining the foreclosure, before his principal and interest shall be sunk by the profits. *R. 2 Ver. 285.*

So, after a decree for foreclosure, *Chancery* will enlarge the time for redemption, in a case of necessity; as where defendant was hindered, by a time of rebellion, from paying at the day limited by the decree. *R. Ca. Ch. 64.*

Tho' the decree be signed and inrolled. *Ibid.*

[If mortgagee brings bill for a foreclosure against the mortgagor and subsequent mortgagees, and the mortgagor acquiesces, and then the subsequent mortgagees purchase in the first; the foreclosure cannot regularly be kept open on the mortgagor's bringing a bill against the subsequent mortgagees, suggesting that all the money secured on his estate, except the first mortgage, was won at play, and forfeited to the heir at law, who has assigned it in trust for him, and praying to redeem on paying what was *bonâ fide* lent, but he may have the advantage of any equity at the hearing notwithstanding the foreclosure; yet the court may (and in this case did) indulge the mortgagor with a short time. *Fleetwood v. Jansen, M. 1742, 2 Atk. 467.*]

If the defendant by his answer offers to redeem, he shall not be foreclosed, tho' circumstances afterwards vary. *1 Ver. 448.*

[If there is a clear tenancy in tail, the remainder-man need not be a party to a bill of foreclosure; if there is an express estate for life he must. *Sutton v. Stone, M. 1740, 2 Atkyns, 101.*]

[And a foreclosure of the first tenant in tail will bind the remainders. *Ambler, 564.*]

[A mortgagee of a copyhold not in possession, may bring his bill before admittance for foreclosure, and after decree bring ejectment. *Ibid.*]

[A mortgagee suing for a foreclosure, may at the same time bring ejectment at law. *Booth v. Booth, T. 1742, 2 Atkyns, 343.*]

[The mortgagee of a naked advowson should not bring a bill of foreclosure, but should pray a sale of the advowson. *Mackenzie v. Robinson, T. 1747, 3 Atkyns, 559.*]

[After foreclosure and sale, the produce not being sufficient to pay the mortgage-money, the mortgagee may bring an action for the residue. *1 Brown, 125.*]

[Where the personalty is deficient, and the same person is heir and executor, the mortgagee may pray a sale in the first instance. *Id. 155.*]

[Mortgagee is not bound to keep the buildings in as good repair as he found them, if the length of time will account for their being in worse. *Russel v. Smithies, 1 Anstr. 96.*]

[A trustee laid out the money of different persons on a mortgage; foreclosure by one *cestuy que trust* as to his share. *Montgomerie v. the Marquis of Bath, 3 Ves. jun. 560.*]

(4 A 12.) When it shall be annulled.

If a mortgage is ancient, and no interest paid or demanded, it shall be presumed to be satisfied, and *Chancery* will enforce the vacating or delivery of it to the purchaser, where the possession for 60 years has been free. *1 Ch. R. 105.*

[Tho' there has been no demand of principal or interest for 20 years, yet a mortgage shall not be presumed satisfied, for the mortgagee is supposed in possession, and the mortgagor is tenant at will. *Leman v. Newnham, M. 1747, 3 Ves. 51.*]

[If

B.M.
N.P. 110

[If a mortgagee cancels a mortgage, and it is found to be in his possession, it is a release; but it does not re-convey, for that must be done by deed. *Harrison v. Owen*, *M.* 1738, 1 *Atkyns*, 520.]

[Altho' non-payment of interest for 20 years, on a mortgage, where clear and no demand, raises a presumption of payment; yet, on doubtful circumstances, and the original mortgage admitted, it was referred to the master to inquire whether any interest had been paid. *Traff v. White*, 3 *Bro. C. C.* 289.]

(4 B) Ne exeat Regnum.

BY the common law, every one might go out of the realm when he pleased. *F. N. B.* 85. *A.* Per two *J.* 2 *Rol.* 12. 4 *Mod.* 179. *Vide Prærogative*, (D 34, 35.)

But by the *st.* 5 *R.* 2. 2. it was prohibited to all, without licence, but to peers, merchants, and soldiers; but this is repealed by the *st.* 4 *Jac.* 1.

Yet a man may be restrained within the realm by the king's proclamation. *F. N. B.* 85. *C.*

Or, by the writ of *ne exeat regnum* under the great or privy seal, or signet. *F. N. B.* 85. *A.*

[*Ne exeat regnum* was originally a state writ, granted by the chancellor on application from the secretaries of state, without cause, or shewing such information as he thought of weight; but towards the end of *James I.* it was thought proper to grant it in case of interlopers in trade, great bankrupts, duels, and others concerning many of the subjects. *Lord Bacon's Ordinances*, No. 89. 3 *P. W.* 313.]

And this writ shall be directed to the party himself. *F. N. B.* 85. *B.*

Or, to the sheriff commanding him, *quod A. venire faciat ad sufficientes manucaptos interveniend. quod ad partes externas sine licentia, &c. se non divertat*, and, upon refusal, *quod prisona committatur quousque.* *Ibid.* 85. *D.*

Or, it may be directed to justices of the peace, or to both. *Ibid.* 85. *E.* 2 *Inst.* 54.

Chancery will award a writ of *ne exeat regnum* after a bill exhibited, upon affidavit of the debt, and that the defendant is going out of the realm. *Ca. Ch.* 116. *Reg. App.* 54, 55.

[The affidavit to obtain it must not only say defendant is indebted, but must mention the facts on which it arises; if against an administrator, it must swear to the belief of assets come to his hands. *Anon.* *T.* 1752, 2 *Ves.* 489.]

[The court will not grant *ne exeat regno*, on a bill for a sum due for goods, obtained by fraud, tho' plaintiff swears he believes the goods were worth 700*l.* he must swear positively defendant is indebted to him in a certain sum; if the bill is for an account, plaintiff's swearing he believes the balance in his favour will amount to so much, is sufficient. *Rico v. Gualtier*, *P.* 1747, 3 *Atkyns*, 501.]

[The court will not grant it, unless plaintiff shews the debt demanded against defendant to be certain, not when it is on a contingency, *Anon.* *M.* 1738, 1 *Atkyns*, 521.]

[It ought not to be granted when the demand is entirely at law; for

for there plaintiff has bail, and he shall not have double bail at law and in equity. 1 *Atkyns*, 521. *Pakeman v. Cosby*, H. 1730, 3 *P. W.* 314.]

[It is never granted where there is not a mere equitable demand; except once, in compassion to a wife who sued for alimony in the spiritual court. *Anon. T.* 1741, 2 *Atkyns*, 210.]

Or, without a bill, on a petition to the lord chancellor. *Pr. Ch.* 171.

[It ought not to be granted without a bill first filed; *per Talbot C.* who said he never knew it done, (tho' it was done by *Trevor M. R.* in *Lloyd v. Cardy*, and by *Cowper C.* in 1709,) and ordered the writ to be superseded, and defendant discharged out of custody; but it seems he had given bail in an action at law. *Brunker's Case*, T. 1734, 3 *P. W.* 312.]

[The court will not order security to be given if the answer is come in. *Whitehead v. Murat*, M. 1724, *Bunb.* 183.]

[But if he has not answered, and is in contempt, it will. *Ibid.*]

Or, if he is going into *Scotland*, tho' since the union it is not out of the realm; for the process of the court does not extend thither. 2 *Sal.* 702. 1 *P. W.* 263.

And the condition of the recognizance shall be, that he does not go out of the realm, or to *Scotland*. 1 *P. W.* 263.

[*Talbot C.* was doubtful whether the common writ would restrain the defendant going to *Scotland*, and also, whether he could alter the old established form; and the registers said, they never knew any other than the common order made; and his lordship would make no order, but left them to proceed in the old beaten path. *Hunter v. Maccray*, P. 9 G. 2. C. T. T. 196.]

A *ne exeat regnum* shall be awarded against a clerk. 2 *Inst.* 54.

And also against a layman. *R. Ca. Ch.* 116.

Awarded against a woman. *Reg. App.* 55.

Against a peer. *Ibidem.*

[The court will grant it against a *feme-covert*, executrix of her former husband alone, if her present husband is gone out of the kingdom. *Jerningham v. Glas*, H. 1746, 3 *Atkyns*, 409.]

It may be awarded upon the surmise of any man. *F. N. B.* 85. F.

When a man designs a prejudice to the kingdom. *Reg. App.* 55. *F. N. B.* 85. D.

So, for a private cause. *R. Ca. Ch.* 116. 2 *Ca. Ch.* 245. *Semb. cont. Ch. R.* 257.

As, if a man be indebted to several, and it be suspected that he will go out of the kingdom to avoid paying his creditors. *R. Ca. Ch.* 116. *Reg. App.* 54, 55.

If there be a sentence against a man for alimony in the spiritual court, and he threatens to leave the kingdom. *R. Ca. Ch.* 116. *R.* 2 *Vent.* 345.

If the bill of a solicitor upon a taxation appears to be overpaid, upon *affidavit* that he has not repaid the overplus, and intends to depart the kingdom; tho' no bill pending against him. *R. Pr. Ch.* 171.

If surety be given that *B.*, against whom a *ne exeat regnum* was prayed, shall not go out of the kingdom, the surety shall not be discharged, tho' *B.* be committed for non-performance of a decree. *Pr. Ch.* 123. Vol.

But a bill to oblige an executor to exhibit an inventory, and to give security to account before he went beyond sea, was dismissed upon a demurrer; for it prayed an injunction in the nature of a *ne exeat regnum*. *R. Ch. R.* 257.

So, a writ of *ne exeat regnum* shall not be granted without oath *Skin.* 136.

Nor, was it used to be granted by courts of justice, but of late times. *Ibid.*

And for a particular cause. 4 *Mod.* 179.

[On a suit in the ecclesiastical court by the wife for alimony, before decree; this court cannot grant a writ of *ne exeat regno* against the husband. *Semb. Coglar v. Coglar*, 1 *Ves. jun.* 94.]

[*Ne exeat regno*, on affidavit of wife, against husband, refused. *Sedgwick v. Walkins*, 1 *Ves. jun.* 49. 3 *Bro. Ch. Ca.* 11. *S. C.*]

[Writ of *ne exeat regno* discharged on paying into court the sum for which it was marked. *Evans v. Evans*, 1 *Ves. jun.* 96.]

[*Ne exeat regno* refused at the suit of the assignee of a bond, the original obligee being dead without representatives. *Ray v. Fenwick*, 3 *Bro. C. C.* 25.]

[*Ne exeat regno* obtained by one inhabitant of *Antigua* against another, on a bond stated on a bill to be lost; discharged, on giving security to abide by the decree. *Atkinson v. Leonard*, 3 *Bro. C. C.* 218.]

[Such writ must be on equitable demand. *Ibid.*]

[To obtain it a certain sum must be sworn to, and it must be probable that the party means to abscond. *Shearman v. Shearman*, 3 *Bro. C. C.* 370.]

[Where plaintiff has two demands on the defendant, the one liquidated, the other matter of account, the writ shall be marked for the former demand only. *Parker v. Appleton*, 3 *Bro. C. C.* 427.]

[Refused against the agent of a surviving executor, having in his possession a bond, which was the security for a residue to which plaintiff was entitled. *Storey v. Higgins*, 3 *Bro. C. C.* 476.]

(4 C) Notice.

(4 C 1.) How regarded.

NOTICE of a trust makes a person privy, and an act, which was a breach of trust in the actor, shall be void as to him who was privy; as, a purchaser with notice of a trust, judgment, mortgage, or other incumbrance, shall be affected by it. *R. Lane*, 60. *Vide post.* (4 I 3, 4.—4 W 28.)

[Purchaser with notice is bound in all respects as the vendor. *Taylor v. Stibbert*, 2 *Ves. jun.* 437.]

[This court will not take the least step against a purchaser for a valuable consideration without notice; not even to perpetuate testimony against him. *Ferrard v. Saunders*, 2 *Ves. jun.* 458.]

[A registered conveyance of premises in *Middlesex* for valuable consideration established against a prior devise not registered, there being no evidence of such notice as amounted to fraud. *Jolland v. Stainbridge*, at the *Rolls*, 3 *Ves. jun.* 478.]

[Tho' a fine be levied, and five years pass without claim. *R.* 2 *Ca. Ch.* 125. *Eq. Abr.* 332.]

If notice be confessed by *A.*, who assigns to *B.*, who denies notice; but it is proved against him; tho' the confession of *A.* cannot be read against *B.*; yet if *B.* will shelter himself by the want of proof of notice to *A.*, he shall be put in the place of *A.*, and found by his confession. 1 *Ver.* 486.]

[Denying notice at the time of execution, or, at the time of paying the consideration-money, is not sufficient; it must be, at or before the execution. *Fitzgerald v. Burk*, T. 1742, 2 *Atkyns*, 397.]

If a man pays a bond to *A.*, who was but a trustee, having before confessed a judgment, and *A.* afterwards makes a warrant to another attorney to acknowledge satisfaction, the payment to *A.*, when he had notice of the trust, is void. *Eq. Abr.* 332. 2 *Ver.* 197.]

So, if *A.* assigns a bond, payment to him, after notice of the assignment, is void. *Ibid.* 1 *Ver.* 540.]

[If a judgment affecting an estate in *Middlesex* is signed in 1733, and registred 12th June 1735, and a mortgage is made 24th May 1735, and registred 2d June 1735, tho' there is proof by one witness that the mortgagee knew of the judgment; yet, if he denies it in his answer, the mortgage shall not be postponed; for the court will not break in upon an act of parliament on suspicion, however strong. *Hine v. Dodd*, H. 1741, 2 *Atkyns*, 275.]

[If *A.* leased of land in *Middlesex* to himself and wife, and to such persons as they shall appoint, which they by deed execute, and then *A.* mortgages, and the mortgage is registred before the appointment, the mortgage shall take place. *Scarston v. Quincey*, T. 1752, 2 *Ves.* 413.]

[Registration in *Middlesex* under the statute of an equitable estate, is not of itself notice to a subsequent legal mortgagee, so as to take from him his legal advantage. *Anbler*, 648.]

[General notice to a purchaser that there are leases, is notice of all their contents. *Taylor v. Stibbert*, 2 *Ves. jun.* 437.]

[Purchaser being told, that part of the estate was in the possession of a tenant, held bound by the lease. *Ibid.* 440.]

[The nature of constructive notice explained in *Plumb v. Fluit*, 2 *Anstr.* 438.]

[*A.*'s knowledge that assignee was on many occasions a trustee for assignor, sufficient to affect *A.* with notice of the assignment. *Semb.* 1 *Ves. jun.* 43.]

[Vendee says he has bought, vendor is silent; this is conclusive notice of the sale to a third person present. 1 *Ves. jun.* 425.]

(4 C 2.) What shall be Notice.

If a man has notice before the conveyance executed, it is sufficient, tho' it was after his contract. *R. Ca. Ch.* 34.

[Or, tho' after he has paid his money. *Wigg v. Wigg*, T. 1739, 1 *Atkyns*, 382.]

[*A.* purchases, pays part, gives bond for residue, before payment of the bond he has notice of an equitable lien on the premises; this is sufficient; for tho' he has no relief at law, equity will stop payment of the bond. *Tourville v. Naish*, T. 1734, 3 *P. W.* 307.]

If a trust be by patent for creditors claiming within a year, and after the year the patentee assigns to *A.*, who assigns to *B.*, not having notice whether the debts are paid or not; notice of the patent is sufficient. *R.* 1 *Ver.* 319. [Where

[Where a man claims under a conveyance, where there is an estate-tail prior to the estate under which he purchased, it is incumbent on him to see if that estate is spent; and he cannot in such case protect himself by plea, as he cannot deny notice of plaintiff's title. *Kelsal v. Bennet*, H. 1736, 1 *Atkyns*, 522.]

If a lease be made with exception of all prior leases, this shall be notice of prior leases, and all covenants contained in them. *Ca. Ch.* 260.

If a purchaser has notice of a settlement upon a wife, &c. after marriage, it shall be notice that it was pursuant to articles before the marriage, tho' the settlement does not recite them. 2 *Ver.* 384.

[But such constructive notice of *ancient* articles, entred into before the rule was established for construing articles, and carrying them into execution, shall not affect a purchaser; as, where by *ancient* articles before marriage, it was agreed to settle the estate on the husband for life, remainder (subject to a charge by way of jointure for the wife) to the heirs male of the husband by his wife, and by a settlement after marriage these articles were in *part* executed; afterwards husband and wife by deed and fine mortgaged part of the premises, and in the deed it was declared that the charge to the wife should be *suspended*, till the determination of the mortgage term, and on assignment of the mortgage term the husband delivered over to the assignee the settlement after the marriage, and took a receipt from him in general, for a settlement. This was held by lord *Hardwicke* not to be sufficient notice to the mortgagee or his assignee. *Ambler*, 285.]

If a deed mentions a will, revocation by another deed, or other such like fact, notice of the first deed shall be reputed notice of all that is contained in the will, the other deed, &c. to which the first refers; for it is his negligence, if he does not inquire after it. 2 *Ca. Ch.* 246. *Eq. Abr.* 331.

So, if a purchaser sees a deed, which was made with power of revocation by will, he shall be presumed to have notice of all that is contained in the will. 2 *Ca. Ch.* 246.

So, if a mortgage is excepted in a deed, notice of such deed shall be notice of all that could be discovered by a sight of the mortgage, tho' it was not in his power to have a sight of the mortgage. *R. Ca. Ch.* 291.

So, if a jointure is mentioned, it shall be notice of all contained in the jointure-deed. *Eq. R.* 7.

So, if a settlement is mixt with writings delivered to the counsel. *Eq. Abr.* 331.

[In all cases, where the purchaser cannot make out a title but by a deed, which leads him to another fact; the purchaser shall not be a purchaser without notice of that fact, but shall be presumed cognizant of it; for it is *crassa negligentia* that he sought not after it. *Ambler*, 314.]

[Thus the mortgagee of a lease, which recited the surrender of a former lease, which was on the surrender of a prior one, in which the plaintiff's title appeared, was held to have notice of the title. 2 *Brown*, 291.]

So, if counsel had the deeds, for the perusal of the title, in

which a trust, mortgage, &c. is mentioned, such notice to the counsel shall be notice to his client. 3 *Ca. Ch.* 110. *Eq. R.* 8. *Vide post.* (4 C 5.)

Tho' he did not observe such recital or mention of the trust, &c. 3 *Ca. Ch.* 110.

So, if his attorney, solicitor, or agent has notice; as, if the same scrivener transacts mortgages for *A.* and *B.* *R.* 2 *Ver.* 574.

So, if *A.* treats for a purchase, and has notice of the incumbrance, and purchases in the name of *B.*, who pays the money, and has no notice. *R.* 2 *Ver.* 610. for *A.* was agent for *B.*

But, if a counsel has notice upon another occasion, and not as counsel for defendant, it shall not be notice to him. 1 *Ver.* 287.

Or, if the counsel has notice, but does not finish the settlement, but another counsel is afterwards employed. *Dub. Eq. R.* 8.

(4 C 3.) *Lis pendens.*

(4 C 3.) *When it shall be noticed.*] So, *lis pendens* is sufficient notice, without actual notice of the suit. 2 *Ca. Ch.* 116.

[If a bill is brought to establish a will, it is *lis pendens*, and affects a purchaser under the will. *Garth v. Ward*, *P.* 1741, 2 *Atkyns*, 174.]

[If an estate be purchased by private contract after a bill brought by creditors for sale of it, the sale will be set aside. *Ambler*, 676.]

[A decree is not implied notice to a purchaser after the cause is ended, for it is the pendency of the suit that is notice; but if the decree is only for an account, and does not put an end to the question, the suit is still notice. *Worsley v. E. Scarbro'*, *M.* 1746, 3 *Atkyns*, 392.]

[A suit about money secured on an estate, or other collateral matter, but not relating to the estate; it is not notice to a purchaser of the estate pending the suit. *Ibid*]

If land is devised to be sold for payment of debts if the personal estate be not sufficient; if a suit be commenced by the heir against the executor or trustees, for an account of the personal estate, a purchaser *pendente lite* without actual notice ought to re-convey to the heir, if by the event of the suit it appears that the personal estate was sufficient. *R.* 2 *Ca. Ch.* 116.

So, if *A.* purchases, and pays his money the same day the bill is filed, he shall lose his money, tho' he had no notice. *Ca. Ch.* 301.

So, if a commission issues against a bankrupt, it shall be notice of the bankruptcy, without actual notice. *Per two Com. Rawlinson cont.* 2 *Ver.* 157. 161.

If *A.* lends money to *B.*, and takes a bond for it in the name of *C.*, and afterwards brings an action in the name of *C.* against *B.*, who confesses judgment, and afterwards pays the money to *C.*, (having notice of the trust,) upon which satisfaction is acknowledged, by another, who was not the attorney upon the record; it will be a fraud upon *A.*, and the changing of the attorney will be notice. *Eq. Abr.* 332. 2 *Ver.* 197.

If a bill be filed, and *subpoena* served, it shall be proof against all persons of a *lis pendens*. 1 *Ver.* 318, 9.

Tho' the *subpoena* be not returnable till the next term.

So,

So, if a bill be filed before purchase, tho' no process is served, it shall be notice. *Semb. 2 Ca. Ch. 116.*

And where a bill is filed, the suit is depending. *5 Co. 47. b.*

So, if a man present at the hearing pay money to *B.*, after a decree that he shall not receive it. *Eq. Abr. 331. 1 Ver. 57. 122.*

But service of a *subpœna* is no proof, before a bill filed, that *lis est pendens*. *1 Ver. 319.*

(4 C 4.) *When not.* *Lis pendens* is not notice, if it was collusive and not real. *2 Ca. Ch. 116.*

So, if the suit abates, a purchaser *pendente lite* shall not be affected by the suit depending, without actual notice. *1 Ver. 286.*

So, tho' a judgment, &c. be upon record, it is not sufficient notice; for express notice of it is necessary. *Ca. Ch. 37.*

So, express notice is necessary where land is devised, upon condition to the heir; for he takes by descent. *8 Co. 92. a. 3 Mod. 28, 4. Eq. Abr. 333.*

Otherwise, if a devise be to a stranger; for he takes by the devise, and shall take notice at his peril. *Eq. Abr. 333.*

(4 C 5.) *When Notice to one affects another.*

Notice of an agreement to an agent or trustee shall be notice to the party himself, who purchases: as, if the scrivener, who draws the mortgage, or transacts the contract, had notice of a prior incumbrance. *Eq. Abr. 330. Vide ante, (4 C 2.)*

[If one person is employed as counsel or agent for both parties, both are affected with notice to him. *Leneve v. Leneve, M. 1748, 3 Atkyns, 646. 1 Ves. 64. Ambler, 436.*]

[If an agent has notice of a prior incumbrance on lands in *Middlesex*, this is a sufficient equity to postpone a second settlement, tho' the last is registred, and the first not. *Ibid. Vide Ambler, 626.*]

[If an agent employed to place out money on a security, admits that by former transactions he knew of an incumbrance, but thought the security good for both, it is good notice. *Ashley v. Bailey, T. 1751, 2 Ves. 368.*]

[But notice to an agent, in order to affect the principal, must be to an agent empowered to treat, not barely to carry proposals from one party to another. *1 Brown, 338.*]

So, if notice is given to *A.*, who purchases in the name of a trustee. *Eq. Abr. 330. Ca. Ch. 338.*

Or, in the name of his son. *Ibid.*

Or, the conveyance be to the son and his heirs, who had not notice. *Ibid.*

So, if *A.* has notice, and purchases in the name of *B.*, and then agrees that *B.* shall be the purchaser, who pays the money not having notice; he shall be affected by the notice to *A.*; for his approbation of the purchase by *A.* makes *A.* his agent *ab initio*. *Eq. Abr. 331. 2 Ver. 609.*

[A second mortgagee, with notice of first, but without notice of a trust-charge prior to both, of which first mortgagee had notice, must take subject to that demand. *E. Pomfret v. Ld. Windsor, T. 1752, 2 Ves. 472.*]

(4 C 6.) When not.

[Tho' a father making settlement appears to have notice of a rent-charge on the lands, yet this is not sufficient evidence of notice to affect wife and son claiming under such settlement as the apparent owner might make. *Whitfield v. Fouffet*, H. 1749, 1 *Ves.* 387.]

If *A.* has notice of a prior settlement or incumbrance, and purchases, and afterwards sells to *B.*, who has not notice, who sells to *C.* who has; *C.* shall not be charged by the notice to *A.* or to himself; for then an innocent purchaser could never sell. *R. cont. per Master of the Rolls, but reversed per Lord Keeper*, Hil. 1695. *Eq. Abr.* 331.

[So, the assignee of a mortgage, thro' assignments from persons not having notice of a defect in the title, is not bound to discover whether he had personal notice. 2 *Brown*, 66.]

[If a man by marriage-articles agrees to settle a church lease on himself, wife, and issue, and afterwards sells it to a stranger, who has no notice of the articles, and his executors sell it to *B.*, who has full notice of them, and takes a collateral security; yet *B.*'s purchase shall stand good against those claiming under the articles. *Lowther v. Carleton*, H. 9 G. 2. *C. T. T.* 187. H. 1741, 2 *Atkyns*, 242.]

So, if *A.* purchases, having notice, and sells to *B.* who has not notice that the vendor was only tenant for life, tho' a bill by the son against *B.* shall be dismissed, yet *A.* shall account for the purchase-money to the son, and for interest from the death of the father. *Eq. Abr.* 331. 2 *Ver.* 384.

And tho' *A.* takes an assignment of a mortgage to protect his purchase, he shall be allowed only the money due upon the mortgage, which was prior to the settlement. *Ibid.*

[If a counsel employed to look over a title, by some other transaction foreign to this business, has notice, it does not affect the purchaser. *Ibid.* *Worsley v. E. Scarbro'*, M. 1746, 3 *Atkyns*, 392. *Lowther v. Carleton*, H. 9 G. 2. *C. T. T.* 187. H. 1741, 2 *Atkyns*, 242.]

[The court is tender of extending constructive notices, but will not lay it down as a general rule, that notice to a person concerned for both parties is not good to a mortgagee, yet will adhere to this rule, that notice should be in the same transaction. *Warrick v. Warrick*, H. 1745, 3 *Atkyns*, 291.]

(4 C 7.) When Notice does not prejudice.

If a man purchases for valuable consideration, he shall not be prejudiced by a voluntary settlement, tho' he had notice of it. *Eq. Abr.* 334.

[A man who purchases for a valuable consideration, with notice of a voluntary settlement, from a person who bought without notice, shall shelter himself under the first purchaser, but his interest must be exactly the same. *Brandlyn v. Ord*, M. 1738, 1 *Atkyns*, 571.]

So, if a bill be against a purchaser for valuable consideration which charges that the defendant had notice, and that it was mentioned in such a lease, and defendant denies notice, and that it is there mentioned; he need not produce the lease, tho' there be a replication

to the answer, without some proof that falsifies his answer; for it tends obliquely to a discovery of his title. *Cont. per Master of the Rolls. R. per Lord Keeper 1794. Eq. Abr. 334.*

So, if a purchaser has notice of a settlement, which makes the vendor tenant for life, but who before issue might bar the contingent remainders, he shall not be affected; if he had not notice that the vendor had issue born five days before. *Eq. Abr. 333. Cited by Rawlinson, 2 Ver. 159.*

(4 D) Obligation.

(4 D 1.) Shall be cancelled.

(4 D 1.) *Being* [F a bond or other security for money be satisfied, and the obligee will not cancel or deliver it to the obligor, *Chancery* will oblige him to do it. 1 *Ch. R. Earl of Oxford, 8. Vide post. (4 D 11.)*

So, if part of the debt be satisfied, upon payment of the residue *Chancery* will compel the delivery of the security.

So, if double security be given for the same debt; as, a bond and a pawn, &c. if one is satisfied, *Chancery* will oblige the cancelling of the other.

So, if the money be paid to my scrivener, who has the disposal of my money.

Or, to my wife, who usually receives money for me. *R. Ca. Ch. 38.*

So, if it be satisfied by one obligor, the other shall be discharged from the bond.

Or, if the bond be released or otherwise discharged.

Or, if it be satisfied by the principal the surety shall be discharged.

Or, if the obligee has accepted other security from the principal.

If after a bond of 900*l.* for payment of 450*l.* it be agreed that the obligor shall pay 80*l.* *per ann.* till the 450*l.* and every part be paid; if by the 80*l.* *per ann.* the 450*l.* and interest are satisfied, the bond shall be cancelled. *R. 1 Ver. 352.*

[Where no demand has been made on a bond for 20 years, it shall be deemed satisfied even at law. *Gratwick v. Simpson, H. 1740, 2 Atkyns, 144.*]

If a recognizance or bond be for payment of an annuity, &c. of ancient date, and no annuity paid or demand for many years, so that it may be presumed to be satisfied, the land out of which it was paid being sold by consent of all parties, *Chancery* will compel the cancelling of the recognizance or bond. 1 *Ch. R. 103. 106. Vide post. (4 D 17.)*

If judgment be given upon the bond. 1 *Ch. R. 107.*

[A judgment shall not be presumed satisfied merely from length of time, (as 42 years,) if satisfaction is not entered on record. *Kemys v. Ruscombe, T. 1740, 2 Atkyns, 45.*]

(4 D 2.) *After forfeiture.* Tho' a bond be forfeited, *Chancery* will compel the cancelling of it, upon payment of principal, interest, and costs; and the obligee shall not have the penalty. *Vide Eq. Abr. 91.*

If the bond be to save harmless, the obligor shall be relieved generally, on payment of so much, as upon a trial at law the obligee appears to be damnified. 1 *Ch. R.* 199.

But if the obligee by his answer swears that he is damnified above the penalty of the bond, there needs no trial; but the obligor shall be ousted of his relief without trial. *Ibid.*

[If a bond be given for goods taken up to raise money by the sale of them, it will be ordered to be delivered up on payment of the money actually raised. 1 *Brown*, 149.]

If a bond, by a subsequent agreement to take 80 *l.* *per ann.* till the whole is paid, be overpaid, *Chancery* will not oblige the repayment of the surplus. 1 *Ver.* 352.

But if principal and interest exceed the penalty, *Chancery* will compel the payment of the interest and costs, as well as of the principal. *R. Ca. in Parl.* 16. *Dub. 2 Ca. Ch.* 185. *Vide ante*, (3 A 4.)—*Post.* (4 D 16.)

Yet, if a judgment be obtained for the penalty, upon payment of so much as is due upon the judgment, with interest from the time of the judgment and costs at law and equity, the judgment shall be satisfied and bond delivered up, tho' the principal and interest due exceed the sum for which the judgment is obtained. *R. Ca. Ch.* 24. 1 *Ver.* 350.

But money paid, not exceeding the interest due, shall be intended to be paid for interest. *Ca. Ch.* 24. *Vide ante*, (3 S 6.)

And, if money be paid the same term, but before actual entry of the judgment, it shall be intended as interest upon the bond, and not to be paid upon the judgment. *R. Ca. Ch.* 24.

So, if land be devised for payment of debts, and the interest due upon a bond exceeds the penalty, nothing but the penalty shall be paid; for the devise was for security of the debt, and not to enlarge it. 1 *Sal.* 154.

(4 D 3.) Or, relieved against.

(4 D 3.) *If the obligation be obtained by fraud.*] If a bond or other security be obtained by fraud or practice, *Chancery* will relieve against it; as, if upon the marriage of *A.*'s son to the daughter of *B.*, *B.* will not consent unless all the debts of the son are discharged, upon which his brother discharges them, but afterwards the son, with the consent of the daughter, gives a bond for the same sum to his brother; *Chancery* will direct the bond of the son to be cancelled, at the suit of the wife, or of the obligor himself. *R.* 1 *Ver.* 348. *Vide ante*, (3 Z 8.)

[If on marriage articles *A.* gives 3000 *l.* with his daughter, and *B.* gives up 300 *l.* *per ann.* of her jointure to her son, for a settlement on the marriage, but the intended husband secretly, without the privity of his relations, gives a bond to refund 1000 *l.*; a perpetual injunction shall go against the bond, at the suit of the obligor himself. *Turton v. Benson*, *M. 6 G. per Parker C.* on appeal from the rolls. *Str.* 240.]

[If a poor man suing for an estate, gives bond to a person assisting him with small sums and taking pains in the affair, and this is obtained by pressing for payment of the money advanced; the bond shall stand as security only for the money advanced, and interest, and

the obligee may bring *quantum meruit* for his pains, &c. *Proof v. Hines*, T. 9 G. 2. C. T. T. 111.]

So, if a bond be obtained from an heir for 800*l.* to be paid at the death of his father, upon the delivery of goods of 400*l.* value, he shall be relieved, upon payment of principal and interest. *R. per Finch*. The bargain being managed by an infamous person, and the father alleged to be then ill, who died within 18 months. *Conf. per North, hesitantly. 2 Ver. 359.*

[If a woman aged 26, but her father being alive, enters privately into joint bonds with a man for marriage, tho' there are no marks of fraud, nor any great inequality of circumstances or condition, yet on application of the woman, the court will (on public and general considerations chiefly, and for that it is a fraud on the parent,) decree the bond to be cancelled. *Woodhouse v. Shepley*, H. 1742, 2 *Atkyns*, 535.]

[The court will direct an inquiry before a master into the consideration of a bond, if there is a suspicion of fraud; as, if two bonds are given the same day for different sums, and one of them just double the penalty of the other. *Reed v. Reed*, M. 1739, 2 *Atkyns*, 16.]

[If a woman about to marry, parts with some of her property, or gives security or assignment, the court will relieve, unless for valuable consideration; and in that case, husband from whom it was concealed, tho' his bill is dismissed, shall not pay costs, unless the concealment was at his wife's request. *Blanchet v. Foster*, P. 1751, 2 *Vesf.* 264.]

[S. aged 30, father and mother dead, married, in possession of 7500*l. per ann.* naturally strong, but hurt by debauchery, greatly indebted, and having great expectations from his grandmother M. aged 78, but healthy, applies to J. a stranger for 5000*l.* to pay his debts, which he gives him, taking a bond conditioned for payment of 10,000*l.* at M.'s death, if S. survives her, but not otherwise. Six years five months after M. dies, and two months after J. delivers up bond to be cancelled, and S. now in great circumstances executes new bond for 20,000*l.* conditioned for payment of 10,000*l.* and interest in four months, and gives warrant of attorney to enter up judgment, which is done; a year after giving the last bond S. pays J. 1000*l.* in part, and three months after 1000*l.* more, and three months after, that is, twenty months after M.'s death, S. dies, having never sought relief against the bargain; his executors shall have relief only against the penalty, but shall pay the principal and interest on the last bond, with costs at law, and for acknowledging satisfaction, (but not in equity,) for this first bond is not usurious, nor contrary to conscience, and relievable on any principle of equity; and if it had, yet the new bond amounts to a confirmation, and is sufficient to bar the executors of relief. *Earl of Chesterfield*, executor of *Spencer v. Janssen*, bart. T. and H. 1750, on great consideration, per *Hardwicke C. Lee C. J. Willes C. J. Strange M. R. and Burnet J.* unanimously. 1 *Atkyns*, 301. 339. 2 *Vesf.* 125. 1 *Wilsf.* 286.]

(4 D 4.) *If the consideration be not performed.*] So, if a bond be obtained,

obtained, without a consideration performed; as, in consideration of a debt assigned, which cannot be recovered. *Vide post.* (4 D 7. 18.)

But if the bond be to pay 20 *l.* per ann. to *A.* for life in consideration that he has assigned two leases to the obligor; tho' the leases were forfeited before assignment, yet if the lessor does not take advantage of it, the obligor shall not be relieved. *Ch. R.* 49.

(4 D 5.) *If the consideration be illegal.*] So, if it be obtained for a thing illegal; as, upon a simoniacal contract.

But a bond to resign, upon request, shall not be avoided. *Vide Eglish, (N 3.)*

Yet, if an ill use be made of a bond to resign; as, if he detains his tithes, &c. an injunction shall be granted upon it. *R. 2 Ch. 186. 1 Ver. 411, 412. Vide Eglish, (N 3.) [Vide Ambler, 268.]*

[If on bond of resignation, instead of requiring it, it is agreed incumbent shall pay 30 *l.* per ann., and he pays it for some years; injunction shall be granted to the bond. *Peele v. Chapel, M. 9 G. Str. 534.*]

So, if the consideration of the bond was for procuring a marriage, tho' there does not appear any fraud or other misfeasance in obtaining it, *Chancery* will give relief. *R. Ca. Parl. 77. R. 1 Ch. R. 87. R. 1 Ver. 412.*

[If a man gives bond to another, for using influence over his grandfather to make a will in his favour, and not alter it, it shall be delivered up, but without costs. *Debenhem v. Ox, T. 1749, 1 Ves. 276.*]

Or, for money borrowed when the obligor was engaged in play by the artifice of the obligee. *1 Ch. R. 89.*

[So, if a bond was given for money won at play, and the obligor afterwards paid part of the money, yet, after several years, the court will order the bond to be delivered up, and the money paid to be returned. *Ambler, 269. Vide st. 9 Ann. c. 14.*]

Or, for payment, if he did not marry his servant. *R. 2 Ver. 102.*

So, if a bond be by a son, upon the settlement of a house upon him by his brother, who had a prejudice against their mother, that he should never permit his mother to come to his house. *1 Ver. 413, 4.*

If a bond be to pay 100 *l.* if she married a second husband; tho' there be a counter-bond to pay as much to her executors, if she did not marry. *R. 2 Ver. 215, 6.*

So, a recognizance, bond, &c. by tenant in tail, that he will not suffer a common recovery, shall be cancelled. *Mo. 809.—Cont.* if given by a son to a father at the time of the settlement on him in tail. *2 Ver. 233.*

So, a bond by tenant in tail, that he will not commit waste. *R. 2 Ver. 251.*

So, if a bond was given by an apprentice for money won at gaming by another apprentice. *R. 2 Ver. 291.*

But if *A.* gives a bond and judgment for money which he borrows to supply persons who game, and gives large premiums; *Chancery* will

will not relive, without payment of principal, interest, and costs. *R. 2 Ver. 171.*

[If a bond is given for having procured the office of a supervisor of excise, and for being to procure the office of collector, it is within *stat. 5 & 6 Ed. 6.* and shall be cancelled. *Law v. Law, M. 9 G. 2. C. T. T. 140. 3 P. W. 391.*]

[If a man on a composition with his creditors, gives a bond to one to pay him the residue of his debt, over and above the composition, in order to induce him to consent, it is void, as within the equity of *5 G. 2. c. 30. ff. 11. Semb. Spurrett v. Spiller, M. 1740, 1 Atkyns, 105.*]

[If a man living separate from his wife, marries a woman who knows not his wife is living, which she afterwards discovers, but the man prevails with her to stay with him; and five years after gives a bond to a trustee for her, to leave her 1000*l.* at his death, and dies; this shall be postponed to all simple contract debts; it is worse than a voluntary one, being on a wicked consideration; had it been given immediately after the discovery, and she had quitted him, it would have been good. *Lady Cox's Case, M. 1734, 3 P. W. 339.*]

(4 D 6.) *Obligation by a surety.* [If a man be bound as surety, and the principal has paid the money, and afterwards the surety is sued, he shall be relieved in *Chancery.*

So, if the surety is damnified, he shall be relieved against the principal, tho' he has not a counter-security: so, by the custom of *London.* *1 Ver. 456.*

[But a surety has no right to have the bond assigned to him on paying the money; and if he tenders the money on that condition, which the obligee refuses and brings action, and surety brings bill; surety shall pay costs. *Gammon v. Stone, M. 1749, 1 Ves. 339.*]

[The court will not order an obligee to assign a bond to the surety on payment, for the principal co-obligor might then plead payment, on an action in the name of the obligee; but *case*, or perhaps *assumpsit*, lies. *Woffington v. Sparks, T. 1754, 2 Ves. 569.*]

[If *A.* tenant in tail, to raise money to pay debts on his estate, proposes to his brother *B.* tenant in tail in remainder to join in mortgage for 1000*l.* and in a bond, which is done, and *A.* only receives the money; the personal estate of *A.* shall be liable in the first place. *Robinson v. Gee, T. 1749, 1 Ves. 251.*]

And if the land of the principal descends to his heir, and is conveyed by him in trust, the surety shall compel a sale of the land for his payment.

Or, if debts are assigned by the principal for satisfaction of the surety, he shall compel the payment thereof to himself.

If *A.* makes a mortgage and *B.* is surety for him, and afterwards it appears that the mortgage was upon a defective title, but he, who had the title, in compassion to *A.* makes a lease to *D.* in trust for *A.*, and then *B.* is sued by the mortgagee; he shall compel *D.* to assign for his security. *R. 2 Ver. 12.*

If there be a judgment against *A.* and against his bail, and afterwards the sureties of *A.* being sued, pay the money; they shall be aided against the bail, and the judgment against the bail shall be assigned

signed to secure to them principal, interest, and costs, without contribution. *R. 2 Ver. 608.*

Tho' the sureties by their bill allege an agreement to pay a proportion, if the bail deny the agreement. *2 Ver. 609.*

If one surety pays the whole, he shall have contribution against the other surety. *Semb. cont. Godb. 243. Acc. Ch. R. 15. Vide ante (2 S).*

[If two persons are jointly bound, and one dies, equity will decree his representative to be charged *pari passu* with the survivor. *Primrose v. Bromley, M. 1739, 1 Atkyns, 89.*]

So, if three are bound in a bond, recognizance, &c. and one only is sued and pays the whole, and another is insolvent, he who has paid shall have contribution against the third for a moiety. *R. Ca. Ch. 246. 1 Ch. R. 35. 120.* But *R.* that the third surety shall pay only a third. *1 Ch. R. 150.*

So, by the custom of *London*, one surety paying the whole shall make the other sureties contribute. *1 Ver. 456.*

If a surety changes himself for another not sufficient, he shall not be charged in equity, upon a suggestion of covin in such exchange; for equity will not charge a surety further than he is bound by law. *1 Ver. 196.*

[If *A.* and *B.* principals, and *C.* surety, are jointly and severally bound to *D.*, and on *C.*'s becoming uneasy, *D.* agrees with *A.* to take four notes, and a draft of *A.* and *B.* on a banker, in lieu of the bond, but makes *A.* give him a note signed in the names of *A.*, *B.*, and *C.*, (but without *C.*'s knowledge, *Semb.*) to make good any deficiency, and *D.* puts the bond, with a receipt for principal and interest, into *C.*'s hands, and *A.* and *B.* become bankrupt; *C.* shall not be liable. *Skip v. Huey, P. 1744, 3 Atkyns, 91.*]

[If a bond is burnt or cancelled by accident or mistake, or procured by fraud by the principal to be delivered up, this court will set it up against a surety, tho' extinguished at law. *Ibid.*]

So, if a son is bound in a recognizance with a father to pay the marriage portion of his daughter, but the recognizance is defective in law; the son shall not be charged in equity. *2 Ver. 393.*

[If a father gives bond for money advanced by his daughter to his son on his marriage, the son pays the interest; yet it shall be a debt on the father's estate, for it is an advancement of the son. *Hill v. Ballard, 1747, 1 Ves. 77.*]

[A receiver shall not be removed at the request of his sureties only, nor the sureties discharged that others may be appointed, unless it appears for the good of the estate. *Griffith v. Griffith, T. 1751, 2 Ves. 400.*]

[Obligee without communication with the surety takes notes from the principal, and gives farther time, the surety is discharged; and the rather, as after the notes were taken, the surety paid over a sum of money to the principal. *Rees v. Berrington, 2 Ves. jun. 540.* See also *Nisbet v. Smith, 2 Bro. C. C. 579.*]

[Joint bond considered as joint and several. *Thomas v. Frazer, 3 Ves. jun. 399. Burn v. Burn, ibid. 573.*]

(4 D 7.) *If there was no consideration for it.* So, the obligor shall be relieved, where the bond was given without a real consideration; as, if

if the lessee of tenant for life at the rent of 100 *l. per ann.* gives a bond for part of the rent due at *Michaelmas*, where the tenant for life died before *Michaelmas*, tho' his death was known. *R. Ca. Ch.* 239. *Vide ante*, (4 D 4.)

If *A.* gives bond to settle his estate upon his brother, and afterwards marries. *R. 2 Ver.* 189.

[The expence a man is at in standing for member of parliament at the request of another, is not a valuable consideration. *Stiles v. Attorney-General*, *H.* 1740, 2 *Atkyns*, 152.]

(4 D 8.) *If there would be a double charge by the obligation.*] So, an obligor shall be relieved, if there would otherwise be a double charge upon him.

But if there be a decree against *A.* to pay 400 *l.*, and he pays 100 *l.* and gives a bond for the residue, and afterwards becomes bound with *B.* the obligee, as surety for 100 *l.* That bond, which is accumulative for the money decreed, shall not be taken to be in satisfaction of the 100 *l.* for which *A.* was surety with *B.* *R. Ch.* *R.* 297.

(4 D 9.) *If there be an artful use of strict words.*] So, if the obligee makes an ill use of words inserted in the condition, the obligor shall be aided in equity; as, if a mother gives a bond for her son, being an apprentice, for his honest behaviour, and that she will pay all that her son by note under his hand acknowledges that he has embezzled; and the master obtains a note from the son of his embezzlement, and three years afterwards informs his mother thereof; the obligor shall be aided, if she pays as much as is proved upon an issue to try *quantum damnificatus*, and the note shall not be allowed in evidence at the trial. *Ch. R.* 47.

[If an unqualified person taken poaching gives bond for 100 *l.* with his father surety, not to shoot, hunt, or fish again, without licence from the gamekeeper, or in company with a qualified person; and three years after, invited by the gamekeeper's brother, he angles and catches two flounders in his company, and dies; and two years after the father is an evidence against two of the lord's servants, and then the bond is recovered against him; the court will order the penalty and damages to be returned. *Roy v. D. of Beaufort*, *T.* 1741, 2 *Atkyns*, 190.]

(4 D 10.) So, the Obligor shall be relieved.

(4 D 10.) *Where the condition by accident becomes unreasonable.*] So, the condition of a bond shall be qualified in equity. *Vide ante*, (2 Q 1.)

As, if an executor gives a recognizance to the chamberlain of *London*, for payment of an orphan's portion absolutely, and afterwards the assets fail; the executor shall not be bound to pay beyond the extent of the assets. *R. Ca. Ch.* 191.

But a bond given for money to be paid upon a purchase shall not be avoided, because the purchase does not answer his intent. *2 Ver.* 243.

So, if a bond be to pay 40 *l. per ann.* out of the profits of an office, and afterwards the office was taken away for several years by the

the usurper, and upon the restoration of the king revived; he shall not pay during the years in which the office was suppressed. *R. Ca. Ch. 72.*

If a bond be for payment of rent for a wharf, which becomes surrounded by water; he shall be relieved against the penalty of the bond, but not against the rent. *R. Ca. Ch. 84.*

If a bond be upon bottomree, in consideration of 400*l.* to perform a voyage in six months, and at the end of six months to pay the 400*l.* with 40*l.* premium; if the ship is detained in the river, he shall pay only legal interest. *R. 1 Ver. 263.*

[If *A.* borrows money of *B.* on bottomree, and agrees to pay 26*l.* per cent. the principal to be discharged when the remittances from the ship and produce are sold, after the return of the ship till the sale only 5*l.* per cent. to be paid; proviso, if the whole goods lost, the principal to sink; if part, to abate proportionably; *B.* shall have 26*l.* per cent. for the sums lent during the voyages outward and homeward; as to the homeward only, in proportion to the value of the goods remitted; and 5*l.* per cent. for the rest of the time. *Warner v. Watkins, P. 1737, 2 Atkyns, 4.*]

If a bond be by mariners that they will not demand wages till the return of the ship from the *East Indies* to *London*, and the ship in the return is taken by an enemy; the mariners shall have wages to the last place of delivery. *R. 2 Ver. 728.*

[If a man enter into a bond to build a bridge and support it for seven years, and the penalty of the bond is the sum actually paid him by the obligees; he afterwards builds the bridge, which is thrown down by a great flood within the seven years, and the obligor refuses to build another, yet an injunction will be granted to restrain an action on the bond, and an issue directed to try *quantum damnificatus*, the sum contained in the bond being a penalty. *2 Brown, 341.*]

(4 D 11.) *Or, is satisfied by other means.*] So, if the condition of the bond be performed by a thing equivalent, the obligor shall be relieved; as, if the condition be to convey 50*l.* per ann. for a jointure, and he devises 50*l.* per ann. to her; for it shall be intended in discharge of the bond. *R. 1 Ch. R. 46. Vide ante, (4 D 1.)*

Or, to leave his wife, if she survives, 500*l.* and the husband by devise gives her lands for life, and other lands in fee, and makes his wife executrix; if the real and personal estate given to the wife amount to 500*l.*, the heir shall have relief against the bond. *Ch. R. 43.*

(4 D 12.) *If the obligation was given by contrivance, or by force, or terror.*] So, if the bond was given by contrivance. *Vide ante, (3 Z 8.—4 D 3.)*

So, if a bond be obtained by duress, it shall be decreed to be cancelled.

Or, by force or terror, tho' there be no actual duress. *2 Ver. 497.*

But if a bond, note, &c. pretended to be given through terror, be afterwards voluntarily confirmed, by judgment, mortgage, &c. it shall not be cancelled by a decree. *Eq. R. 9.*

[If *A.* under criminal prosecution, unable to get bail, employs *B.* an attorney, who by *A.*'s instructions in writing, draws his will; with a legacy of 1000*l.* to *B.*, who afterwards procures bail for *A.*, and on the very day *A.* gives bond to *B.* to be void on leaving him a legacy of 1000*l.*, *A.* afterwards revokes this will, and makes another, leaving no legacy to *B.*; yet equity will relieve against the bond. *Walmesley v. Booth*, T. 1739, and P. 1741, 2 *Atkyns*, 25.]

(4 D 13.) So, the Obligee shall be relieved.

(4 D 13.) *If the obligation be lost.*] So, an obligee shall be relieved, where the deed or bond is lost.

Tho' the deed or bond be voluntary. *Semb. Ca. Ch.* 78.

So, if a bond be lost and the principal insolvent, the obligee shall be relieved against the surety. *R. Ca. Ch.* 78. 2 *Ca. Ch.* 22, 3.

So, if a statute, recognizance, &c. be lost.

So, if an annuity be given to a maid-servant, and the bond for securing it is lost, it shall be decreed. *Eq. Abr.* 24.

[If *A.* and *B.* give a joint bond, and the condition is joint and several, the representatives real and personal of one dying, are liable. *Bishop v. Church*, M. 1750, 2 *Ves.* 100. 371.]

An obligee does not lose his equity against a joint-obligor or his representatives, by refusing them liberty to sue the other joint-obligor in his name; for he is not obliged to do it. *Ibid.*]

But there shall be no relief upon a motion, without a bill against all concerned. *Ca. Ch.* 270.

(4 D 14.) *If the performance was not effectual.*] So, if husband gives a bond after marriage to make a jointure upon his wife, the husband makes a jointure and the bond is cancelled, and afterwards the jointure is evicted; the wife shall be relieved out of the personal estate of the husband to the value of the jointure. 1 *Ver.* 427.

If *A.* gives a bond to a lessee for his quiet enjoyment, and he is evicted for non-payment of rent, upon which the bond is sued and 20*l.* recovered; *Chancery* will compel the lessee to repay the 20*l.* to *A.* 1 *Ch. R.* 95.

So, if *A.* lends 100*l.* to *B.* and *C.* and takes a bond for it, in the name of a trustee, from *B.* and *C.* and afterwards marries *B.* tho' the bond be extinct at law, *A.* shall have relief in equity. 2 *Ver.* 290.

[If money is lent to two persons, and either thro' fraud or want of skill, the bond is made joint only; the court will decree as if it had been joint and several. *Simpson v. Vaughan*, H. 1739, 2 *Atkyns*, 31.]

[If husband previous to marriage gives bond to wife, to secure her 1700*l.* if she survives; as there is fraud in the husband, equity will carry the agreement into execution according to the intention. *Watkins v. Watkins*, M. 1740, 2 *Atkyns*, 96.]

[If *A.* gives a bond to *B.* a merchant, as a security for his service in buying goods abroad, where he is to stay a limited time, he buys very little, and returns before the time; this court cannot decree the penalty, for it is a bond for service only, and not like a *nomine pene*,

pana, where it is considered as the stated damages. In this case the remedy is action *quantum damnificat*. *Benson v. Gibson, M. 1746; 3 Atkyns, 395.*]

(4 D 15.) But the Obligee shall not be relieved.

(4 D 15.) *If the obligor was a surety, &c. and not chargeable by law.* But, generally, an obligee should not be relieved in equity against a surety, upon a defect in the bond, whereby the surety is not chargeable by law. *R. 2 Ca. Ch. 23.*

Tho' the defect happens by the act of the court itself; as, if the court orders a recognizance with surety to perform an order upon the hearing of a cause, and to pay what shall appear due by the report of such a master, and the master dies, and the plaintiff dies insolvent, whereupon the obligee procures *A.* to take out administration and to revive the suit, and obtains a report of another master that 300 *l.* is due. *Ibid.*]

So, an obligee shall not be decreed to cancel a prior security, upon an agreement to do it upon giving other security to his creditors, if the other security be not effectually given. *Ca. Ch. 302.*

(4 D 16.) *Nor, shall he be relieved beyond the penalty of the obligation.* So, an obligee shall not be relieved beyond the penalty of his bond; as, if *A.* covenants with the *East India* company to pay a mulct for every piece of cloth exported, and takes *B.* for his mate, who gives bond of 50 *l.* penalty that he will not export, and afterwards exports so much that the mulct amounts to 70 *l.*, *A.* shall not have relief for the residue beyond the penalty of the bond. *R. Ca. Ch. 226. Vide ante, (4 D 2.)*

[*Sed vide Bunb. 23. Shaw, P. C. 15. 2 Term Rep. 388.*]

If *A.* upon a sale of land, gives a statute or bond for quiet enjoyment, and the land was entailed, *Chancery* will not relieve the purchaser beyond the penalty of the bond or statute. *R. 1 Ch. R. 94. Eq. Abr. 288.*

If *A.* gives a bond of 1600 *l.* penalty to pay 77 *l.* per ann. till 1100 *l.* be satisfied, and does not pay it; he shall be discharged on payment of the penalty of the bond. *1 Ch. R. 201.*

So, tho' he has paid divers sums before. *2. 2 Ver. 509.*

But if the obligee has judgment, and does not take out execution, he shall have interest after the judgment as well as before, tho' it exceeds the penalty of the bond, and it was his own laches that he did not take out execution. *Eq. Abr. 288.*

If a bond recites an agreement and is given for the performance of it; the obligor shall be decreed to perform, tho' it exceeds the penalty. *R. 2 P. W. 192.*

[So, if a father on marriage of his daughter, gives bond to settle one third of whatever lands come to him on his father's death, the court will decree a specific performance. *Hopson v. Trevor, M. 9 G. Str. 533.*]

If a son is bound with his father to *A.* for 200 *l.*, and the father gives a statute to the son for his indemnity, and afterwards mortgages to *A.* for 200 *l.*, he shall not be allowed to make use of that statute to defeat the mortgage for the 200 *l.* *R. 2 Ver. 40.*

If

If a lessee agrees to pay 20 s. an acre increase of rent, if he plows meadow, &c. he shall not be relieved against the penalty. 2 Ver. 110. [1 Atk. 239. 4 Bur. 2229. 2 Term Rep. 36, 37.]

(4 D 17.) An Obligation shall be delivered up.

(4 D 17.) *If it be not sued within a reasonable time.*] So, an indenture of apprenticeship, and a bond for performance, shall be delivered up after the service is expired, if not sued within a reasonable time.

R. Ca. Ch. 70.

So, a mortgage shall be delivered up to the purchaser, if the mortgagee be constant of the purchase, and does not give notice, nor make demand for 17 years; for it shall be presumed to have been discharged. 1 Ch. R. 60.

So, if a bond be to pay 30 l. within nine days, and it is put in suit after two and twenty years, where the defendant was at all times responsible. 1 Ch. R. 78. 88.

So, tho' the suit be by an executor, where there had been no demand of principal or interest, and the testator died but eight years before. 1 Ch. R. 78.

So, a statute or recognizance, after 40 or 50 years shall be presumed to be discharged, where no demand appears, and there have been several purchases of the estate. 1 Ch. R. 106. 137.

But where interest has been paid, the antiquity of the statute, bond, &c. does not prejudice. Ca. Ch. 304.

[Where two partners are obligors, and on breaking up the partnership agree that all bonds shall be discharged by one only, and the obligee agrees with him to leave the money with him on a higher interest, and receives such interest accordingly, and leaves the money in his hands for many years while solvent, and on a commission of bankrupt comes in and has his dividend, yet the other obligor shall pay the remainder of the principal and interest at the first rate. Heath v. Percival, M. 7 G. Per Parker L. C. Str. 403.]

(4 D 18.) *If the obligee refuses to perform his part.*] If the other party refuses performance of the agreement for which the bond was given, Chancery will compel the delivery of the bond to the obligor; as, if A. sells land, a ship, &c. and takes a bond for the money; if A. afterwards refuses to convey, the vendee shall have his bond delivered up, tho' the vendor afterwards is willing to convey. R. 2 Ca. Ch. 5. *Vide ante*, (2 C 16.—4 D 4.)

If A. puts his son apprentice to B., and gives a bond for his fidelity, and B. covenants that he will settle the cash-book every month; if B. neglects to do it, and the son embezzles 800 l., A. shall be relieved for so much as was embezzled after the first month. R. 2 Ver. 518, 19.

(4 D 19.) When there shall be no Relief upon an Obligation.

(4 D 19.) *If the penalty does not appear excessive.*] An obligor shall not be relieved against the penalty of a bond, where there is no measure which will shew the penalty to be excessive; as, where a man is bound in 20 l. that he will not prejudice another in his trade, and he says, that his wares are not good, whereby he loses a customer

for a small matter; the obligor shall not be relieved; for the costs at law and equity are equal to the penalty. *R. Ca. Ch.* 184.

[If an unqualified person is carried before a justice for carrying a gun, enters into bond with his father for surety of 100*l.* not to shoot, hunt, fish, &c. again, unless with the gamekeeper's licence, or in company with a qualified person; it shall not be set aside; for such bonds are beneficial, even to the obligor; and they are not *malum in se*, but similar to the bonds directed to guard against offences in the customs, and against deer-stealing. *Roy v. D. of Beaufort*, *T.* 1741, 2 *Atkyns*, 190.]

[Such bond shall not be deemed a bare security that the obligor shall not offend again, but is by way of stated damages between the parties. *Ibid.*]

[If *A.* aged 24, gives bond for payment of 500*l.* to *B.* six months after his father *C.*'s death, then seventy, if he survives him, if not the bond void; *B.* dies, two years after his executor assigns to *D.* *C.* dies, *D.* dies, application to *A.* who does not deny the bond, but knows nothing of *D.*'s executor, *A.* dies, application to his widow, then action brought and verdict and judgment, and before judgment a bill for relief fifteen years after *C.*'s death, this court will only relieve against the penalty. *Hill v. Caillovel*, *M.* 1748, 1 *Ves.* 122.]

(4 D 20.) *If there was no real satisfaction.*] So, he shall not be relieved upon pretence of payment, where there was no real satisfaction; as, where *A.* was bound to *B.* being sequestered in the time of *Oliver Cromwell*, and had an order to retain the debt due on the bond for so much due to him by the state; this being a mere retainer, and the bond not cancelled or delivered up to *A.*, Chancery would not relieve him against a suit by *B.*, tho' the act of oblivion discharged it upon payment, &c. *Per Bridg. Ld. K. Ca. Ch.* 59. *Vide ante*, (4 D 1, &c.)

So, he shall not be relieved, upon the presumption of payment from the ancient date, when there is a reasonable cause for the delay. *1 Ch. R.* 117. *Vide ante*, (4 D 17.)

So, if *A.* and *B.*, partners, be bound to *C.*, and afterwards the partnership is determined, and the share of *A.* paid to him, and *B.* undertakes the payment of all the debts, and upon application by *C.* for payment, it is agreed to be continued at 6*l.* per cent., and afterwards *B.* becomes bankrupt; the executor of *A.* shall not have relief against the obligee, for bonds are not discharged till payment. *R. 1 P. W.* 683.

(4 D 21.) *If it was præmium pudoris.*—[A bond given to a kept mistress for maintenance of her and her child, shall not be set aside in favour of obligor's legitimate children, or heir, (if not obtained by fraud,) but shall not be paid out of the personal estate till after simple contracts, and if personal falls short, then out of real estate. *Cray v. Rooke*, *M.* 9 G. 2. *C. T. T.* 153.]

So, he shall not be relieved, for that the bond was given to a woman whom the plaintiff kept as his mistress, where it was given with his free consent, and not obtained by a common strumpet. *R. 1 Ver.* 483, 4. 2 *Ver.* 242.

Tho'

Tho' it is recited as given for money borrowed. 1 Ver. 483.

Or, for secret service. 2 Ver. 242.

Tho' the defendant was proved to be a common strumpet, where that was not expressly charged by the bill. 1 Ver. 484.

[If *A.* becomes acquainted with an orange-wench at the playhouse, gives her a bond for 1000*l.* to marry her in a twelvemonth, or pay her 500*l.*, and afterwards gets the bond from her and destroys it, but offers to execute a new one, which he afterwards refuses, and she brings bill for the 500*l.*, and dies, and her mother and administratrix revives; *A.* shall pay her the 500*l.* and interest from filing the original bill and costs. *Atkyns v. Farr*, H. 1738, 1 *Atkyns*, 287.]

So, if the bond cannot be recovered at law, upon proof that there was such a bond, the woman shall be aided. 2 *P. W.* 432.

So, a bond or a grant to a woman debauched, defective thro' fraud, shall be aided by the court. *Eq. Abr.* 31. 2 *P. W.* 432.

So, a bond to a maid servant shall not be presumed to be *ex turpi causa*, if it be not proved. *Eq. Abr.* 24.

But a bond obtained by a common strumpet, by imposition, shall be relieved against, at the suit of the executor of the party. *R.* 2 Ver. 188.

[But the court will not relieve against a voluntary bond given to one who *had* been a common strumpet before the obligor became acquainted with her, after he had kept her several years. *Ambler*, 641.]

[If a bill be brought to have satisfaction for a bond alleged to be given as *premium pudicitia*, and a cross-bill to be relieved against it, on a suggestion that the obligee was a lewd woman of an infamous character; under this general charge, evidence of particular facts may be given, but it must be pointed and applied to the general charge; and if it is proved that she was guilty of acts of lewdness before her acquaintance with the obligor, the court will order the bond to be delivered up. *Clarke v. Periam*, T. 1742, 2 *Atkyns*, 333. 337.]

[If a bond is given by *A.* upon articles importing a direct assignment by a husband of his wife (who is also a party) to the use of *A.*, with covenant for quiet enjoyment, and further assurance, and an assignment and bill of sale are given by *A.* in trust for the benefit of the wife, they shall both be set aside, as *pro turpi causa*. *Robinson v. Gee*, T. 1749. 1 *Ves.* 251. 254.]

[But if *A.* by will devises the same goods to the wife. *Qu.* Whether it shall be set aside? *Ibid.*]

[If a young woman of good character comes to live in a married man's family, is seduced by him, and is the occasion of separation between him and his wife, the court will not give relief on a bill for payment of 100*l.* and an annuity granted by him to the woman. *Priest v. Parrot*, H. 1750, 2 *Ves.* 160.]

Tho' not charged by the bill to be given *ex turpi causa*, if the defendant by her answer insists that it was for a debt. 2 Ver. 188.

[After verdict on a bond against the obligor, bill charging the consideration to have been an agreement by the defendant to cohabit with the plaintiff as his wife, and that she had lived in a state of adultery and incontinence with various persons, and praying a discovery, and

and that the bond might be delivered up. Demurrer allowed. *France v. Bolton*, 3 *Ves. jun.* 368.]

(4 D 22.) *If it was voluntarily given, without imposition or surprize.* So, he shall not be relieved, because it was given without consideration, where it was given of his free will. 1 *Ch. R.* 157. *Semb.* 2 *Ver.* 497.

So, if an accountant, discharged by an act of indemnity of an account, afterwards makes up his account, and gives a bond for the balance; he shall not be relieved against his bond to the king without the king's consent. *Semb. Hard.* 204.

(4 E) Partition.

SO, Chancery will make partition of land by commission. 2 *P. W.* 519.

Tho' the estate be in trust for *A.* and *B.* in tail, and *A.* be an infant; but the conveyance from the trustees shall be respited, till the full age of *A.*, that he may join, and mutual conveyance be executed. 2 *P. W.* 519.

[Partition of an estate held in common a good execution of a power to sell or exchange. *Abel v. Heathcote*, 2 *Ves. jun.* 98. 4 *Bro. C. C.* 278. *S. C.*]

[An estate held in common cannot be so settled on the marriage of one tenant as to prevent the right of the others to make partition. *Ibid.* 100.]

[Chancery entertains suits for partition, tho' a proceeding at common law; and tho' no express authority be given by the stat. to that court, as to joint-tenants. 2 *Ves. jun.* 124.]

[A bill for partition is a matter of right, and there is no instance of not succeeding in it, but where there is not proof of title in the plaintiff. *Ambler*, 236.]

So, a partition shall be made of a large waste, tho' it may be inconvenient. 2 *Ca. Ch.* 237.

[The strongest arguments of inconveniency will not prevail, tho' the plaintiff was entitled to 3 or 400 acres, and the defendant to four or five only, and tho' the defendant would rather have given up his part than be at the expence of a partition, yet it was decreed, and that it should be at the equal expence of both parties. *Ambler*, 237.]

[And the difficulty, however great, of making a partition, is no objection to making a decree for one. *Id.* 589.]

And it may be decreed, tho' either party be an infant, or *semi-covert*. 1 *Ch. R.* 235.

[But where an infant is one of the parties, whether plaintiff or defendant, he has time to shew cause against the decree, and therefore the court will order the other party's conveyance to be respited till the same time. *Ambler*, 197.]

So, if a partition is agreed between tenants in tail, it shall be decreed against the issue. 2 *Ver.* 233.

Tho' the agreement was by *parol*. *Ibid.*

But if the land lies in Ireland, the court does not decree a partition.

tion; for a bill for partition is in the nature of a writ of partition, which lies not for land in another kingdom. 2 *Ca. Ch.* 189. 214. 1 *Ver.* 421. *Vide ante* (3 X).

[A commission to set out lands shall not be granted, if defendant denies plaintiff's title, and says he has no lands in his possession belonging to plaintiff. *Bishop of Ely v. Kenrick*, *M.* 1732, *Bunb.* 322.]

[If there is a mistake (as if the date of a year when a thing was done) in the return of a commission, it may be amended by the commissioners on motion. *Rouse v. Barker*, *P.* 1728, *Bunb.* 251.]

(4 F) Payment; what shall be.

If a man upon a purchase gives security for the money, this amounts to payment. *Ca. Ch.* 99.

So, if an executor, &c. gives security for a legacy. *R. Ch. R.*

27.

If a mortgage is proved, in which there is a receipt for the money, and a condition to be void on re-payment, with the oath of the party that it was paid; after ten years, it shall be sufficient proof of the payment against all persons. *Semb. Ca. Ch.* 119.

If upon a note or bill by *A.* for 100*l.* to *B.*, the money is produced, and *B.* counts 50*l.* and puts it in a bag, and throws it upon the counter; it shall be payment, and if the money is taken away, *B.* shall lose it. *R. Sal.* 507. *R. 5 Mod.* 398, 9.

If a man trusts a scrivener, &c. with taking a security for money, and the custody of the security; payment to the scrivener is sufficient. *Ca. Ch.* 93. 1 *Sal.* 157.

So, payment after a decree, to the solicitor in the cause, shall be good against the plaintiff. 2 *Ca. Ch.* 38.

So, if the security be only by bond, and the scrivener is entrusted with the bond; payment of the principal to him as well as of the interest, upon delivery of the bond, shall be good. 1 *Sal.* 157.

So, if the mortgagee agrees that the mortgagor shall pay to the scrivener, payment of interest to him during the life of the mortgagee shall be good, tho' he has not the custody of the security. *Ibid.*

And if his executor accepts of the scrivener money due on the mortgage, after the death of his testator; this warrants the payment by him to the scrivener. *R. 1 Sal.* 157.

Otherwise, if a man employ a scrivener to put out his money, but has the security in his own custody; payment to the scrivener, without cancelling the security, does not discharge the borrower. *R. Ca. Ch.* 93. 111. 1 *Ver.* 150.

So, payment of the money to one who usually receives the obligee's money, without taking up the bond, does not discharge the obligor. *R. Ca. Ch.* 94.

So, if a scrivener be entrusted with a mortgage, payment of the principal to him upon delivery of the mortgage deed does not discharge the mortgagor; for tho' the custody of the deed gives him authority to receive the interest, yet there ought to be an assignment of the mortgage to warrant the payment of the principal. *R. 1 Sal.* 157.

So, a composition for a debt with a scrivener, who usually received the interest, and made the loan of the money, and declared that the obligee would be guided by him in the composition, binds the scrivener, tho' not the obligee, he not being privy. *R. 2 Ver. 128.*

So, if payment be made to a scrivener, where the debt was secured by bond and judgment, and the scrivener delivers up the bond only. *Dub. 2 Ver. 265.*

If a man be indebted to *A.* upon bond and by contract, and pays money to him generally, *A.* may apply it to which debt he pleases. *2 Ca. Ch. 84.*

If a debtor pays generally a sum which does not exceed the interest due, it shall be intended only for interest. *Vide ante, (3 S 6.—4 D 2.)*

If he be indebted upon a judgment and bond too, and the purchaser of his estate pays part generally; it shall be applied to the judgment, if the creditor does not give notice that he takes it for the bond debt. *1 Ver. 468.*

So, if *A.*, indebted upon bond and simple contract, pays generally, it shall be applied to the simple contract debt, which does not carry interest, tho' *A.* in his account places it to the bond. *R. 2 Ver. 607.*

But if the debtor expressly pays for satisfaction of one debt, it shall be payment for that. *Ibid.*

So, if a debtor has accounted with *A.* for both debts, and so much remains for the balance of the account, and he afterwards pays to *A.* generally; it shall be applied to both debts *pro rata*. *R. 2 Ca. Ch. 84. 1 Ver. 34.*

If *A.* pays generally a sum, which may be for the interest of a bond, it shall be intended for that, tho' there was a judgment in the same term upon the bond, if it was not actually entred up; and not a payment upon the judgment. *R. Ca. Ch. 24.*

If a man pays part to an executor, and gives his note, &c. for the residue, it shall be payment; and if the debtor afterwards fails, it shall be a *devastavit*. *1 Ver. 474.*

If a devisee be bound by a condition annexed to the devise, to pay 300*l.* to *B.*, and pays it into court, *B.* may take it, and the devisee shall be discharged of the condition and penalty. *R. Ch. R. 61.*

But if *A.* takes a bond in the name of *B.*, and recovers against the obligor, who, knowing *B.* to be only a trustee, without order pays the money to him, and he fails; the payment does not discharge the obligor. *R. 2 Ver. 198.*

So, if trustees for *A.* make a loan, and a bond is given to them, which takes notice of the trust, and the bond is in the custody of *A.* and afterwards an account is settled with one of the trustees, who gives a receipt for so much received for *A.*, the payment does not discharge the obligor. *R. 2 Ver. 539.*

So, payment by the obligor to the obligee, after notice that he had assigned the bond, is no discharge to him. *2 Ver. 540.*

(4 G) Perpetuity.

(4 G 1.) In Chattels Personal.

Chancery will not allow a perpetuity, viz. an interest in-tail, which cannot be barred. *D. of Norf.* 35. *Vide 3 Ca. Ch.*

And therefore, if a man gives 600*l.* to three daughters, to be equally divided, and if one dies without issue, her part to go to the survivors; if one marries, and afterwards dies without issue, the husband shall recover the part of his wife; for it cannot be entailed. *R. 2 Vent.* 349.

So, if a man devises the surplus of his personal estate to one in trust for his son, and if he dies during his minority without issue, in trust for others, and makes *A.* executor during the minority of his son, and afterwards his son executor, who at the age of 18 years dies without issue; *R.* that the administrator of the son shall have it, for it was vested in him when he attained the age of 17 years, and could not be devised over. *2 Vent.* 368. *Qu. per me. R. 1 Ver.* 327. 347.

So, if a man devises money to *A.* for life, and if he has issue, to his children, and if he has no issue at the time of his death, to *B.*, the limitation to *B.* is void. *R. Pol.* 37.

If he devises to *A.*, his daughter and executrix, the surplus of his personal estate, but if she dies without issue, then to go over to *B.*, and directs that she shall give a bond, that in such case it shall go to *B.*, the limitation to *B.* shall be void. *1 Ver.* 478.

[If a man devises money to his daughter, and the heirs of her body, and then to another person, it has not been solemnly determined that the whole shall go to the first taker. *D. per Hardwicke C. Phipps v. Steward, H. 1737, 1 Atkyns, 285.*

[A limitation over of personal estate after the death of the first taker, *without issue generally*, is void, as being too remote. *Beauclerk v. Dormer, T. 1742, 2 Atkyns, 308.*]

[Equity admits like limitations in personal as in chattels real; but will carry the limitation of a personal chattel, or the trust of it, no further than the judges do legal limitations of terms for years. *Ibid.*]

[The court will not admit of a distinction between chattels personal and chattels real, for it would introduce confusion. *Ibid.*]

[If a man makes his will, and directs his executors to entail his personal estate on his daughter and her issue, and, on failure thereof, to divide it moiety between his two nephews; his intention being it be made good to his daughter for life, and her lawful heirs for ever, and on their failure, to go to his said nephews moiety; it is too remote, and the nephews take nothing. *Qu. as to the issue. E. Stafford v. Bulkeley, H. 1750, 2 Vesf. 170.*]

So, if a devise be of household stuff, plate, &c. to *A.* for life, and afterwards to his first, second, and other children, and the heirs of their bodies as an heir loom, and afterwards to *B.* and his children in the same manner; *B.* shall not compel *A.* to give security that they shall go accordingly. *1 Ch. R.* 260.

So, if a man devises his real and personal estate to *A.*, and the children

dren of his body, and if he has no issue, &c. this devise giving an estate-tail in the lands to *A.* shall be an absolute disposition of the personal estate to him. *F. g. 320.*

So, if it be to *A.* and the heirs of his body, and if he dies, not having heirs of his body living, then as to that which he does not dispose of in his life, to *B.* for charitable uses; the devise to *B.* is void, for *A.* had the absolute power over the whole. *R. 5 G. 2. F. g. 315.*

Or, one moiety to *A.* and the heirs of his body, and after his death to his sister, for default of such heirs, and the other moiety to the sister for life, and afterwards to the heirs of her body, and for default of such heirs, after her death to *A.*; tho' the moiety to the sister goes over after her death, yet the devise of the moiety of the personal estate to *A.* shall be absolute. *R. F. g. 321.*

So, a chattel personal, as a horse, cannot be granted to *A.* during his life, for the grant is absolute. *D. 2 Rol. 49. l. 30.*

It cannot be devised to *A.* for life, remainder to another. *R. 1 Rol. 610. l. 27.*

So, if a devise be to *A.* of personal estate, and if he die not having heirs male of his body, then of *so much as he shall be actually possessed of at his death* to a charitable use; the devise over is void, for it was an absolute devise, with a power of disposing to *A.* *Per King, 5 Geo. 2. 15.*

[So, where the interest of a sum of money was given to *A.* for life, and at *his death* to devolve to the heir of his body, and, in default of issue, remainder over, the remainder was held to be void, and the principal to vest absolutely in *A.* *2 Brown, 127.*]

But if rarities are devised to his wife for life, and if she shall have a son, to such son, and if she has not a son, or such son dies without issue, to *B.* for life, and that he leave them to *C.* his son; if the wife has not a son, and *B.* dies in the life of the testator, *C.* has an interest after the death of the wife, and she shall be a trustee for *C.* *R. Ca. Ch. 130. 2 Ver. 60. Vide post. (4 W 5.)*

So, if interest be devised, a moiety to *A.*, and a moiety to *B.*, and if *A.* dies, *B.* shall have the whole for his life, and *B.* dies without issue of his body, the principal shall be divided between *C.* and *D.*; the devise of the principal upon such contingency shall be good. *R. 2 Ver. 38. 60.*

So, if money be devised to *A.*, and if she dies under the age of 21 years, without issue, to *B.*, it shall be a good devise to *B.* if *A.* dies without issue before her age of 21 years. *R. 2 Ver. 87.*

Or, to *A.* for life, and if he dies without children, to *B.*, it shall be a trust for *B.* *F. g. 318.*

Or, to his niece, upon trust that she shall take the interest for her use, and after her death that the interest shall be for the maintenance of her children till age, and then the money to be divided between the children, and for default of such issue, to *A.* If the niece has no issue, it shall be a trust for *A.* *R. and aff. in Parl. Ibid.*

[In general, the words, "dying without issue," are taken in a general sense, "dying without ever having had issue;" and then they are words of entail. *Vide Ambler, 72. 123. 2 Brown, 558. 578.*]

[And then a limitation over is void, the first taker having an absolute interest; as, if a testator gives personal estate to *A.* for life, and if

if he die without issue, then to *B.*; here the intention of the testator was plainly that no benefit should accrue to *B.* if *A.* had issue, and and the intermediate estate not being expressly disposed of, it is necessarily implied that the testator meant to give to *A.* an interest which might be transmitted to his issue; but the law allowing no entail of a personal estate, *A.* takes absolutely, and the limitation over to *B.* is void. 2 *Brown*, 578.]

[But these words may, from the context of a will, be so taken as to mean dying without issue living at the death of the devisee, and then they will mean only a contingency, on the happening or not happening of which the devisee over is to take, and such limitation will be good. *Ambler*, 63. 123.]

[As, where personal property was bequeathed to testator's two daughters, and in case either should die without issue, the whole to the survivor; and in case one of them, by name, should die *without issue* after testator's decease, then her share to *S. B.*, it was held that the latter words meant *without issue at her death*. *Ambler*, 72.]

[So, where bank stock was bequeathed to testator's daughter for life, remainder to such child or children of the daughter as should be living *at her death*; and if she should not leave any, or if all should die *without issue*, then to *J. S.*, the daughter had a son born at the time of making the will; it was held that the words "dying without issue," meant "without leaving issue," and the limitation to *J. S.* good. *Ambler*, 122, 123. *Vide* (4 G 2.)]

And an interest derived out of a freehold may be limited otherwise than a chattel merely personal; and therefore, a next avoidance may be granted to *A.* and his assigns during the life of *A.*, in which case the assignee shall not present, if the avoidance does not happen in the life of *A.* *R. 2 Rol.* 49. l. 20.

(4 G 2.) In Chattels real.

So, a term for years shall not be limited to create a perpetuity. *Vide post.* (4 W 19.)

And the trust of a term shall not be limited, nor the limitation allowed in equity, further than the term may be limited by law. *Per Ld. Nott.* 3 *Ca. Ch.* 28. 48.

And therefore a limitation of the trust of a term, after the dying of any one, without issue, is void. *R. D. of Norf.* 3 *Ca. Ch.* 28. 2 *Ver.* 684. *R. Jon.* 15.

[If a man devises chattels real to his son *A.*, and the issue of his body, then to his son *B.* and the issue, &c. then to *C.* &c.; the whole interest vests in *A.* and the limitations over are void. *Fereys v. Robertson*, *P.* 1731, *Bunb.* 301.]

[If *A.* devises his full and whole estate, bank stock, &c. to his nephew *B.* and his legitimate heirs, and if he dies without them, to *C.*; legitimate heirs are heirs of his body lawfully begotten, and the contingent limitation is too remote, and void, unless something confines it to the time of his death. *Barret v. Beekford*, *T.* 1750, 1 *Ves.* 519.]

As, if the limitation be to a man till *B.* dies without issue, and then to *C.*, the limitation to *C.* is void. *Aggr.* 3 *Ca. Ch.* 32.

Or, to *A.* and the heirs of his body, and afterwards to *B.* *R. per two J. Dy.* 7.

So,

So, if a term be limited to one and his issue, and if the issue die without issue, remainder to *B.* Tho' the limitation to the issue is void, yet the remainder is also void, being after the limitation of a dying without issue. *Agr. 3 Ca. Ch. 29.*

So, if a term be limited in trust for him for life, and afterwards for the 1st, 2d, and 3d sons successively in tail, and if he has no son, then to the daughter: the limitation to the daughter is void, tho' he never had a son; for it depends upon a remote contingency; the death of the son without issue. *R. 1 Mod. 115. Agr. 3 Ca. Ch. 29.*

[If a man seised and possessed of real and personal estate, devises to trustees to pay the profits to *A.* for life, and if she marries *B.* then after her death to *B.* for life, after both their deaths to their first and other sons in tail-male, then to their daughters, to be equally divided, for want of such issue, to the issue male or female of the survivor, if neither leave issue, then to *C.* for life, and then to the children *D.* should at his death leave living, or his wife be *ensent* with, that shall attain 21, their heirs, executors, &c.; this limitation of the personal estate of testator to the children of *D.* cannot be maintained; for *A.* and *B.* were made tenants in tail, and the limitations after that are void. *Sabbarton v. Sabbarton, M. 8 G. 2. C. T. T. 55.* *N. B.* This decision is contrary to the opinion of *B. R.* on a case stated for their opinion in this cause by the chancellor; where it is determined by the four judges, that if a term for years had been bequeathed in the same manner, the limitation had been good. And a decree was made accordingly, *per Hardwicke C. in M. 1739, B. R. H. 413. Andr. 333. C. T. T. 245. 2 P. W. 699.*]

So, a limitation of the trust of a term to *A.* for life, then to such person as *A.* by deed or will shall nominate, and after the death of the nominee to the right heirs of *A.*, the limitation to the right heirs is void; for no limitation can be after a life not *in esse.* *R. Ca. Ch. 8.*

Or, if it be to *A.* for life, remainder to his first son for life, and if he dies without issue, to his second son; the remainder is void. *R. 1 Lev. 29c. 1 Sid. 450.*

[But the words, "if he die without issue," may, from the context of the will, be so construed as to mean *children*; in which case the devisee has an interest only for life, the children are to take as purchasers, and a limitation over will not be too remote. *2 Brown, 553.*]

[Thus, where a term was given to trustees, in trust to permit testator's brother to enjoy the rents and profits for 99 years, if he should so long live, remainder to the *first* son of the brother, &c. and in default of *such* issue, then over; *such* issue means the first son, &c. the brother takes only an estate for life, the first, &c. sons by purchase; and if the brother has no children, the limitation over is good. *Ibid. 558.*]

[So, where testator gave the accumulation of rents and profits, till *A.* should attain 21, to be laid out, and the trustees to permit *A.* to receive the interest during his life; then he gave the money to the issue male of *A.* and in default of *such* issue, then over. The issue male of *A.* would have taken as purchasers, therefore the limitation is not too remote. *Id. 570.*]

So, the limitation of the trust of a term to one, and if he dies during the

the term, then to another, is a good limitation of the remainder.
Dy. 277. b.

So, a limitation to one for life, and afterwards to 20 others for life successively, when all are *in esse* at the same time, is good for all the remainders, tho' there be a possibility after a possibility. *Agr.*

3 *Ca. Ch. 29. Ca. Ch. 8.*

So, a limitation to one for years, and afterwards to his son for life, and afterwards to the first issue male of the son for life, tho' the son had not then any issue, is good; for the limitation depends only upon the contingency of one life *in esse*. *R. 3 Ca. Ch. 29.*

So, if a limitation be to *B.* and the heirs of his body, *quamdiu Tho.* has issue of his body, and if *Tho.* dies without issue (his wife not being *privement enseint*) in the life of *B.*, then to *C.* The limitation to *C.* is good upon such a contingency, which expires within the space of one life. *R. per Finch, three J. cont. per North, but affirmed in Parl. Duke of Norfolk's Case, 3 Ca. Ch. 32, &c. R. cont. 2 Cro. 459. Jon. 15.*

So, if a limitation be for life, and afterwards to *A.* if he be living at the time of the death of the tenant for life, but if he be dead, then to the eldest son of *A.* then living, and if *A.* die without issue in the life of the tenant for life, then to *B.*, the remainder to *B.* is good. *R. Ca. Ch. 132.*

[If a man devise a term to *A.* for life, remainder to the children *A.* shall leave at his death, and if they die without issue, then to *B.*; this is a good devise over to *B.* *Atkinson v. Hutchinson, P. 1734, 3 P. W. 258.*]

[If a lease for years is settled in trust, to permit *A.* to receive for life, then *B.* for life, then to trustees to assign to the eldest son of *A.* on *B.*, and for want of such issue of such son, to their daughters equally; if no issue, to *A.*, his heirs, executors, &c.; this shall be construed as dying without such son living at the time of his death, and the remainder over to the daughters is good. *Exel v. Wallace, H. 1750, 2 Ves. 117.*—Affirmed by *Ld. Hardwicke* on appeal, *T. 1751, 2 Ves. 318.*]

So, a limitation to *A.* his executors, administrators, and assigns for ever, but if he die without issue before 21, to *B.*, shall be good to *B.* *2 Ver. 151, 2.*

So, if a limitation be to *A.* for life, and afterwards to his first son for the residue of the term, and in default of his issue, to the second and other sons, and in default of issue male, to his daughter; if there never be a son, the limitation to the daughter shall take effect. *R. 2 Ver. 600. 1 Sal. 156. F. g. 320. R. 2 P. W. 618.*

[If a man by his will gives his (leasehold) house, pictures, and statues to his wife for life, and if she marry again, to his eldest son and his issue, &c. and if testator leave no lawful issue, then to *A.* and his issue; and by another clause declares that his eldest son and his issue, and if he leave none, his eldest daughter and her issue, shall have his whole estate real and personal, except what he has given to his wife, or to other uses; and by another clause, that if no son or daughter shall leave a child behind them, then the said *A.* and his issue shall have all his estate, real and personal, just in the same manner, and with the same restrictions and exceptions as to his wife; the limitation to *A.* is not too remote, and he shall have the house, pictures and statues. *Sheffield v. E. Orrery, M. 1745, 3 Atkyns, 282.*]

If

If a limitation be of the trust of a term, to one and the heirs of his body, this gives the whole term to him, his executors, and administrators.

So, if the remainder of a term be limited to such person as *A.* shall nominate, the nominee has the whole term to him, his executors, and administrators, tho' his executors are not named. *Ca. Ch. 8.*

(4 G 3.) In an Estate of Inheritance.

So, an estate of inheritance cannot be limited in such manner as may introduce a perpetuity. [See *Fearn's Conting. Rem.* 392.]

And therefore, if a man by deed or will, limits his estate in use or by way of trust to *A.* in tail, and afterwards to *B.* in tail, with divers remainders over, and annexes a condition or proviso, that if *A.* attempts to alien, his estate shall cease, as if he was dead, &c. such condition is void. *Co. Litt.* 377. *R. 1 Co.* 85. *Corbet. D. 1 Co.* 130. *R. Mo.* 470. 601. *R. 6 Co.* 40. *R. 10 Co.* 41. *R. 2 Cro.* 697. *R. Mo.* 592. *Cro. El.* 378, 9.

So, if he obliges every *cestuy que use* to give a statute, that he will not alien, *Chancery* will decree such statutes to be cancelled; for by such means a perpetuity would be introduced. *R. Mo.* 810.

So, in any case, if the limitation be in such a manner, that all, who have any interest, by joining in a conveyance cannot pass or bar their interest, it will be a perpetuity. *Ca. Ch.* 213.

If a devise be to *A.* for life, and afterwards to his son for life only, and in default of such issue, to *B.* for life, and so to 20 others for life, without disposing of the inheritance; after all the lives *in esse*, the limitation shall be to the first son of *A.* and the heirs of his body, &c. otherwise a perpetuity would be introduced. *R. Eq. Ca.* 128.

[If a man makes his will, "I make *A.* my sole heir and executrix, if she dies without issue, then to *B.* he to pay *C.* 5000 *l.* and to *D.* and her daughter 100 *l.* each, and *A.* to keep *D.*;" and *A.* levies fine, and suffers recovery; the limitation over is void, and cannot be confined to *A.*'s dying without leaving issue at her decease. *Beauclerk v. Dormer, T.* 1742, 2 *Atkyns*, 308.]

[If by marriage articles *A.* covenants to settle 200 *l.* on his wife for life, then to trustees to preserve, &c. for his first son, then to the first son of such first son, with remainders over; the first son takes an estate-tail, for one not in being cannot take less. *Hucks v. Hucks, T.* 1754, 2 *Ves.* 568.]

[Whether a settlement, empowering trustees from time to time, at the request of tenant for life in possession on the birth of a son, to reduce the estate-tail of such son to an estate for life, was agitated on the duke of *Marlborough's* will, but never determined. *Ibid.*]

(4 G 4.) Or Freehold.

So, if a man covenants to stand seised to the use of *A.* for life, and afterwards to the first son of *A.* for life, and afterwards to the first son of the body of such first son for life, then to several others for life successively; all the remainders, which are not settled in some person during the life of *A.* are void. *Semb. Mo.* 371.

So, a devise to *A.* and his eldest heir male, and so from heir male to heir male for life for ever, shall be void to all who do not come

in esse during the continuance of the estate in possession. *R. Mo.* 371.

So, a devise to *A.*, and afterwards to every one who shall be his heir, is good to the next heir in remainder only. *Ibid.* 372.

But an estate may be limited to cease upon a contingency, which expires within the compass of a life, tho' such contingency cannot be barred; as, if an estate be devised to *A.* and his heirs, with a proviso that if *A.* dies without issue in the life of *B.*, the estate shall go to *B.* and his heirs; the contingent devise to *B.* is good, tho' it cannot be barred by a common recovery. *R. Cro.* 592. *Pell and Brown.*

So, if land be limited in trust for *A.* for life, and afterwards for *B.* for life, and afterwards for their issue, and afterwards for the heirs of *A.*, with a proviso, that if *A.* and *B.* die, not having issue living at the time of the death of the survivor, and the heirs of *B.* pay 4000 *l.* to the heirs of *A.* within a year after the death of the survivor, not having issue living, then the estate in fee to *A.* shall cease, and the fee shall be to the heirs of *B.*, the limitation shall be good; for it does not make a perpetuity. *R. cont. in Chanc. by Lord Chanc. Somers between Sir Evan Lloyd and Godolphin and wife against Sir Richard Carew and Tremain, and the bill dismissed; but the dismissal was reversed upon an appeal in parliament, 13 Jan. 1697. (Com. 20. Ca. Parl. 137.)*

(4 G 5.) A Term that attends an Inheritance.

A term for years may be entailed, if it be limited to attend the inheritance. *1 Vent.* 194. *Vide post.* (4 W 19, 20. 22.)

[For the nature of a term attending the inheritance, see *1 Term Rep.* 765.]

Tho' it be by several deeds, and executed at several times. *R. 1 Vent.* 195.

So, if a term be created for a particular purpose, when that purpose is answered, the term shall be decreed to attend the inheritance: as, if the term be for raising portions; when they are raised, the term shall attend the inheritance. *1 Sal.* 154.

So, if a termor purchase the inheritance, his term shall be attendant. *Ibid.*

If a term be created by a woman seised in fee, for a provision for the children of a first marriage, and afterwards in trust for her, her executors, or administrators, and her husband dies without issue, and she takes a second husband; he shall not have the term, but it shall be attendant upon the inheritance. *R. 1 Sal.* 154. *Vide ante,* (2 M 9.)

If a woman recovers dower, and a purchaser with notice has a term prior to the marriage assigned to attend the inheritance, she shall not have relief in equity. *R. and aff. in Parliament, 1 Ver.* 357. *Ca. Parl.* 69. *Eq. Abr.* 219.

If a purchaser of the inheritance of *cestuy que trust* in tail has a recovery by *cestuy que trust* in tail, and a prior term assigned for his protection; the term shall be a security to the purchaser against him in remainder after the estate-tail. *1 Ch. R.* 245.

(4 H) Power.

(4 H 1.) When aided, tho' not pursued.

(4 H 1.) *If it be for* [F a man has a power to make leases, and he payment of debts.] for valuable consideration makes a lease, but not pursuant to his power, *Chancery* will relieve. 1 *Ch. R.* 185. *Vide Pojar*, (A 1.) [Appointment (2 F). *Cowp.* 651. 1 *Term Rep.* 432.]

So, where a man having a power to make a lease in possession, made a lease to commence at a future day (which is void by law) for payment of debts, for which the lessee was engaged with the lessor, which was enjoyed by the lessee for many years, and then the lessee died without other assets, the lessor was decreed to make the lease good to a creditor of the lessee, for money which came to the use of the lessor, tho' the lessor pleaded that the lessee was also indebted to him. *R. Ca. Ch.* 10. 1 *Ch. R.* 185.

So, if a man has a power to make a jointure, but the execution thereof is deficient in any circumstances, it shall be aided in *Chancery*. 2 *Ca. Ch.* 30.

So, if a man has a power to make a lease for 10 years, and makes it for 20, it shall be good in equity for 10 years. *Ca. Ch.* 23. 3 *Ch. R.* 11.

So, if a man in any case has a power to create an estate, &c. and does it for payment of debts, but the power is not pursued, it shall be aided in equity. *Per Treby*, 3 *Ca. Ch.* 89.

(4 H 2.) *For provision for younger children.*] So, if a man for provision for younger children (having a power to charge land with 500 *l.*) gives instructions for a conveyance of other land to raise portions, and if this was not sufficient, to raise the residue upon that land, but dies before the conveyance made; that land shall be charged with the residue, under 500 *l.* against the heir, tho' the circumstances of the power were not pursued. *R. Ca. Ch.* 264. *Vide ante*, (3 Z 4.)

So, if a man who has a power to charge land, &c. charges it for a provision of younger children; tho' the power be not pursued, it shall be helped in equity. *Per Treby*, 3 *Ca. Ch.* 89. 91, 92. 2 *P.W.* 490.

[So, where a power was given by will to the wife, to dispose of real and personal estate to her children as she should think proper, and of several children the eldest was provided with an estate, and the others had scanty provisions; she appointed only a guinea to the eldest, and it was held good. *Ambler*, 660.]

[Where there is a power to dispose among children, and there is only one child, the property vests in such child without appointment. 2 *Brown*, 588.]

So, if a termor limits the term to trustees for such persons as he shall nominate, and he names *A.* to receive the profits for payment of legacies; if his power does not extend to give an interest to the executor or administrator of *A.*, it shall be supplied out of his estate, otherwise the legatees, &c. upon the death of *A.* would be defeated. *R. Ca. Ch.* 9.

So,

So, if a term to raise portions for younger sons by way of use be void, it shall be aided. 3 *Ca. Ch.* 91. *R. cont. Ca. Ch.* 160.

So, a power for the benefit of younger children shall be aided, tho' the settlement was voluntary. *Ca. Ch.* 183. *Cont. Ca. Ch.* 160.

[But under a power to appoint among younger children, one who becomes an eldest before the time when the appointment takes place, cannot take a share appointed to him by name. 1 *Brown*, 77.]

[If *A.* has a power to dispose of an interest in such shares as he thinks fit among his children, and for want of appointment, to his right heirs; and he by will delegates it to his wife, to dispose in such shares as she thinks fit, between his son and daughter, and for want of appointment, in equal shares to them; this is a good appointment to the two children, in equal shares; for *A.* could not delegate his power. *Ingram v. Ingram*, *M.* 1740, 2 *Atkyns*, 88.]

[Where there is a power to charge an estate with a gross sum, it implies a power to charge it with interest. *Boycot v. Cotton*, *M.* 1738, 1 *Atkyns*, 552.]

[Portions charged on a reversionary fund shall not in general be raised till the term comes into possession; yet when it is expressly directed under a power that they shall be raised as soon as may be, they shall bear interest from the death of the testator. *Conway v. Conway*, 3 *Bro. C. C.* 267.]

(4 H 3.) *For the aid of a purchaser.*] So, if a power be not pursued, there shall be relief in equity, in behalf of a purchaser. *Per Treby*, 3 *Ca. Ch.* 89.

Or, in aid of the wife upon marriage articles. *Semb.* 2 *Ca. Ch.* 28.

(4 H 4.) *If it be not pursued by reason of fraud or accident.*] So, there shall be relief in equity, when the power is not pursued by reason of any fraud or accident; as, if a man be prevented from pursuing some circumstances by sickness, &c. *Per Treby*, 3 *Ca. Ch.* 89. *Per Holt*, *ibidem*, 109.

(4 H 5.) When the Execution of a Power shall be made by the Court.

So, if a man covenants to make a jointure on his marriage, and has not any estate which can be settled, but only a power, before the execution whereof he dies; the settlement shall be decreed out of his power, if the bill be proper. *Semb.* 2 *Ca. Ch.* 28. 30. *Per Master of the Rolls*, *Earl of Cov. Case*, 12.

So, if land be devised to an executor, to sell for payment of portions to younger children, and the executor dies before sale; the heir shall be decreed to sell. *R. upon Demurrer*, *Ca. Ch.* 35. *Vide ante*, (3 A 6, 7.)

So, if *A.* has a power to make a jointure, and by articles on his marriage, and on payment of a portion, covenants to make a settlement of 500*l.* *per ann.* for a jointure pursuant to his power, and dies before the settlement made; he in remainder shall be decreed to execute his power. *R.* 1724, *Earl of Coventry's Case*, *Fra.* 20. *Eq. Ca.* 160. *Vide Eq. Abr.* 348.

So, if a trustee covenants to execute his power and does not do it; it shall be decreed. 2 *Ver.* 465.

So,

So, if a father after marriage, settles his estate, part for a jointure, and the residue upon his issue male, with a power to charge 500*l.* for younger children, and covenants to do it, but dies before he has charged it; it shall be decreed by the court; for the covenant amounts to an execution of the power. *Per Ld. Somers, Eq. Ca. 167.*

So, if an infant having a power to settle a moiety of his estate for a jointure, and upon his marriage he and his mother covenant by articles to settle 100*l. per ann.* for a jointure; it shall be decreed. *Per Cowper, Eq. Ca. 167.*

So, if *B.* in remainder, after the death of *A.* without issue, has such a power, and covenants upon his marriage, to execute it, and *A.* afterwards dies without issue, and *B.* survives and does not do it. *R. Eq. Ca. 167.*

[A person having a power by marriage articles to charge an estate, of which he was tenant for life with intermediate remainders, with a contingent fee to himself, executes the power by will; the contingent fee afterwards comes to him; tho' by the accession of the fee the power be gone, yet the provision made by the will shall be served out of his estate in fee. *Cross v. Hudson, 3 Bro. C. C. 30.*]

[Bequest to *A.* for life, with power on her marriage to appoint the interest to her husband for life, and a recommendation to dispose of the principal, after her own death and the determination of the preceding trusts, among the children of *B.*; the recommendation being an absolute trust, the interest was held vested in all the children, subject to be divested by appointment; and there being no appointment, children born after the death of the testator, and such as died in the lifetime of *A.* held entitled with the rest. *Malim v. Barker, at the Rolls, 3 Ves. jun. 150.*]

[The court will not execute a power given by the testator to trustees to continue his charities, or to bestow any others they should think fit. *Coxe v. Basset, at the Rolls, 3 Ves. jun. 155.*]

[Power to the survivor of husband and wife to appoint among children not well executed by a deed by both. *M^r Adam v. Loggan, 3 Bro. C. C. 310.*]

[Where a seal is required by the power, an appointment among children without seal void. *Ibid.*]

(4 H 6.) When a defective Execution shall be aided.

So, if an intent to make execution of a power be evident, tho' all circumstances are not observed, it shall be aided; as, if a man has a power to charge land with 500*l.* by deed or will under his hand and seal, and he by his will under his hand devises 500*l.*, but there is no seal, it shall be aided. *R. Ca. Ch. 263. Earl of Coventry's Case, 5. Vide post. (4 H 7.)*

If a man has a power to limit an estate to his children, by writing before two witnesses, and by will, executed before two witnesses, devises a rent to his children; tho' it is not a good devise for want of three witnesses, it shall be a good execution of the power in equity. *3 Ca. Ch. 69.*

So, if he has a power to raise portions by deed or will, executed in the presence of three witnesses, and he does it by a will, to which there are only two witnesses. *Eq. Ca. 168. [Vide 1 Brown, 363. 368.]*

[So, a power to appoint a real and personal estate by will shall be duly executed, as to the personalty, by a will, tho' not attested by three witnesses. 1 *Brown*, 147.]

[If father tenant for life, and his son in tail, agree to charge land with a sum for younger children after father's death, as he by will duly executed shall appoint, and he appoints by will, executed before two witnesses, it is good, for nothing passed from him; otherwise, had it been the owner of the estate. *Jones v. Clough*, T. 1751, 2 *Ves.* 365.]

So, if he has a power to make a jointure by deed under his hand and seal, and he by his will under his hand and seal gives the estate to his wife for life. R. 2 *P. W.* 490.

[So, if he has a power to make provision for younger children, by deed, and he makes it by will for children before provided for. *Ambler*, 64.]

[So, if a married woman having a power to dispose of 300 *l.* by will signed and sealed by her, make a testamentary paper not sealed, but stamped; this is equivalent to sealing, and is a good execution of the power. 2 *Brown*, 585.]

If having a power to make a jointure to the amount of 1200 *l. per ann.* he covenants to do it, and afterwards makes a jointure of lands supposed to be of that value, but which are not; it shall be supplied. R. *Eq. Ca.* 167. [*Vide Ambler*, 3.]

[If one has a power to settle a jointure of 4000 *l. per ann.* without deduction or abatement for any taxes, charges, or impositions, imposed or to be imposed, parliamentary or otherwise; and articles are made, that he will settle 300 *l. per ann.* over and above reprises, pursuant to the power, and a settlement is made of lands, with covenant that the lands shall produce 3000 *l.* clear of all taxes and prizes, and there appears afterwards a deficiency; the jointress shall have the deficiency made good, and is entitled to such a jointure as at executing the articles were worth 3000 *l. per ann.* free from all incumbrances, rent-charges, rents-seeck, fee-farms, quit-rents, annuities, stipends to ministers, pensions and procurations, and from all parliamentary taxes or impositions, of such nature and kind as were in being at the time of executing the said power, and particularly from the land-tax then in being. *Marchioness Blandford v. Duchess Marlborough*, P. 1743, 2 *Atkyns*, 542.]

[If A. has a power to settle a jointure (*i. e.* to convey a legal estate) on any after wife during her life, not exceeding 600 *l. per ann.*, and he in execution of it conveys the lands to trustees, (not to the wife,) to raise clear 300 *l.*, and by another deed 300 *l.* more clear of taxes, &c. this execution is void in law and equity; but the court will decree the trustees to convey to the wife a jointure not exceeding 300 *l. per ann.* liable to taxes, &c. *Hervey v. Hervey*, M. 1739, *Atkyns*, 561.]

[Equity will supply a defective execution of powers, in case of younger children, and provision for a wife, as well as in favour of purchasers or creditors. *Ibid.*]

[And it will aid, if intended for provision, whether voluntary or not. *Ibid.*]

[It is not necessary that the wife or child applying be totally unprovided for. *Ibid.*]

[A person who has not the provision stipulated for, must be considered as absolutely unprovided for. 1 *Atkyns*, 561.]

So, if *A.* has power to charge a term with portions, and he raises a new term for those portions, which is void in law; the prior term shall be charged against a purchaser; tho' the portions were voluntary. *R. Ca. Ch.* 290.

If he has a power to charge 2000*l.* upon land, and makes a mortgage for 2000*l.* generally; it shall be taken as an execution of the power. *Semb. Ca. Ch.* 104.

If a settlement be with a power, that if there be a daughter, and he in remainder does not pay 2000*l.* to the daughter, at her age of 16 years, at one payment, the trustees may distrain for the portion with damages; the trustees shall be decreed to sell, tho' no power of entry or sale is given. *R. 2 Ver.* 2.

[If a man sufficiently describes the estate he has a power to charge, it is bound, tho' he does not refer to the deed out of which the power rises. *Probert v. Morgan*, *P.* 1739, 1 *Atkyns*, 440.]

[Partition of an estate held in common, a good execution of a power to sell or exchange. *Abel v. Heatbottle*, 2 *Ves. jun.* 98.]

[Where testator refers to a power, but does not legally execute it, but has other estates, to which the will can apply, the defect of the execution cannot be supplied; tho' where he could not make the gift, but by virtue of the power, he shall be supposed to have intended to execute it, and therefore the defect shall be supplied. *Lowson v. Lowson*, 3 *Bro. C. C.* 272.]

(4 H 7.) When it shall not be aided.

(4 H 7.) *If the intent of the power is not pursued.* But when the intent of the power is not pursued, it shall not be aided in equity; as, if a *feme-sole* makes a settlement upon herself for life, remainder over, with power to make leases for three lives, while she is *sole*; if she marries, and the husband and wife make a lease for three lives, it shall not be aided in equity. *R. Ca. Ch.* 18.

[If for providing for such younger children as father and mother shall leave unmarried or unprovided for, trustees are to raise 1000*l.* to be paid *such* younger children, in such manner and proportion as they shall appoint, and in default to *said* younger children, or *some* of them as survivor shall appoint, and in default, equally; and father surviving, and very old, appoints 50*l.* to *A.* to pay a debt which he owes, 125*l.* to *B.*, 825*l.* to *C.*, and nothing to *D.* it is void; as contrary to the intent of the power, which is to provide for all unprovided for, and annexing a condition he had no power to annex. *Burleigh v. Pearson*, *T.* 1749, 1 *Ves.* 281.]

[So, where a man having power to jointure, executed it to the full extent; but it was agreed that the wife should have only 20*l.* a-year, and the rest of the rents should go to pay his debts, and then as he should appoint; this was held fraudulent against the remainder-man, except as to 20*l.* a-year. *Ambler*, 233.]

[So, where an estate was settled after the death of the father and mother, on such child as the father, with consent of trustees, should appoint; and in default, on the first, &c. sons; the father, by misrepresentation, prevailed on the trustees to consent to his appointing to the younger son; the appointment was set aside. *Ambler*, 272.]

[So,

[So, where a power in a marriage settlement was given to the husband to appoint the settled estate among the children, in such shares as he should think proper, not exceeding estates-tail. He appointed to *two* of the children *one* acre for their *lives*, and the life of the survivor, then to fall into the residue, which he appointed to his *second* son for life, with remainder over: this was held an elusory execution of the power, and therefore bad. 1 *Brown*, 450.]

If *A.* has a power to make a limitation of lands to such a purpose by his will, a draught of a will not executed, since the statute of 29 *Car.* 2. 3. shall not be aided. *Per Gilbert, Earl of Coventry's Case, Fra.* 5.

If a man gives the residue of his estate to his wife, with power to dispose thereof with the concurrence of his trustees; if she by her will makes a disposition without his trustees, it shall not be decreed. *R.* 2 *Ver.* 723.

[If a widow have power by her husband's will to appoint a sum of money in such proportions as she shall think fit among the sisters, nephews, and nieces of testator, and she appoint to *great* nephews; this is not a good appointment, and if the residue was properly appointed, this shall lapse into the residue and pass with it. *Ambler*, 514.]

[If a widow by her husband's will has power to appoint 6000 *l.* among her children, she cannot give to grandchildren, nor give a discretionary power to another to appoint. *Alexander v. Alexander, T.* 1755, 2 *Ves.* 640.]

[If she gives part to *C.* for life, and then to her children; *C.* has it for life, and then it falls into the residue. *Ibid.*]

[If she gives part to trustees to apply it as they think fit, for the support of her son *F.* his wife and children, but not to pay his debts; *F.* is entitled to the whole, and it must be subject to his debts. *Ibid.*]

If the power be to dispose by deed or will, it must be an effectual will, signed by three witnesses, &c. *R.* 1 *P. W.* 741. 2 *P. W.* 259.

Tho' the devise be of an estate to a charity. 2 *P. W.* 260.

Or, of the trust or equity of redemption of a copyhold estate. 2 *P. W.* 261. (*Vide the note ibid. cont.*)

(4 H 8.) *Nor, where it was not the party's purpose to execute his power.*]
So, if tenant in tail, with a power to make a charge upon land for 2000 *l.* by deed or by his will, makes a mortgage for 2000 *l.* by lease and release, and dies; the issue in tail, who claims by marriage settlement, shall not be compelled in equity to confirm the mortgage, or to execute such an estate to the mortgagee, as might have been executed by his ancestor, according to his power. *R. Ca. Ch.* 104. 1 *Ch. R.* 275.

[So, where testator having a power over 3000 *l.* originally the property of his wife, gave several legacies, and then, after the decease of his wife, gave the residue over: his estate was not sufficient to pay the legacies; yet it was held that the will was not an execution of the power, no reference being made to it, and there being nothing by which an intention appeared in the testator to execute it. 2 *Brown*, 297.]

If a man, having a power of revocation, in a passion breaks the seal, but afterwards delivers the deed to the trustees to be preserved to the same uses; it is no revocation. *R. 3 Ca. Ch. 69, 70.*

So, a non-execution of his power shall never be aided. *2 P. W. 490. [1 Vef. jun. 272.]*

So, if the power be, that *A.* may raise so much money, &c. and *A.* does nothing towards executing it; the court will not execute it, tho' it seems reasonable in aid of creditors. *2 Ver. 465.*

Nor, if he directs a deed to be prepared for such purpose, but does nothing more, and neither signs or executes it; for his intention does not appear to be complete, and it was at his election to raise it or not. *E. of Cov. Case, 16.*

[Three powers by settlement; first, to husband and wife jointly to raise and appoint 5000 *l.*; secondly, to husband alone to raise and appoint 2000 *l.*; thirdly, to survivor to raise and appoint such sum as would, with the sum before raised, make 5000 *l.*: the wife joined in raising 3000 *l.* under the joint power for the husband; he covenanted not to charge by the power reserved to him alone, or any other power whatsoever, during her life, and so long as said 3000 *l.* should remain unpaid, without her consent: after her death, he by deed poll did charge with 2000 *l.* more to be paid to his executors for debts, &c. and otherwise in performance of his will, or as he should thereby appoint; and died, leaving his second wife executrix, without taking notice by his will of the charge; but the deed poll was found uncanceled among his papers: the 2000 *l.* held to be well charged, and to go to the executrix without a special appointment. *Earl of Uxbridge v. Bayly, 1 Vef. jun. 499. 4 Bro. C. C. 13. S. C.*]

[Charge well created by settlement, tho' for a volunteer, not revoked by a general revocation of the uses under a power for the mere purpose of partition of joint estate, and re-settling to the same uses the separate part to be taken on partition. *Ibid.*]

[A power of appointment not executed by a general disposition by will. *Croft v. Slee, at the Rolls, 4 Vef. jun. 60.*]

(4 H 9.) *If the power was created by a voluntary settlement, and executed voluntarily.*] So, if a power, created by a voluntary conveyance, be not well pursued, it shall not be aided in equity; as, if a man by a voluntary settlement gives an estate to his son for life, with a power to make an appointment to a younger son, so that it commence after the death of his wife, and he makes an appointment to commence after the death of himself and wife. *R. upon Demurrer, Ca. Ch. 160. Vide post. (4 O 7.)*

Yet, a power to raise portions for younger children has been aided in equity, when the circumstances were not pursued, tho' the settlement was voluntary. *Ca. Ch. 161. 263. Vide ante, (4 H 2.)*

So, a power created by a voluntary settlement has been aided (when it was not pursued) against a person who claimed under the same settlement. *Ca. Ch. 263, 4.*

Prerogative.

Vide Title Prerogative.

Presentation to a Church.

Vide Esglise, (H 1, &c.)

Privilege.

Vide Title Privilege.

Process.

Vide Ante, (D 1.)—Vide Title Process.

(4 I) Purchase.

(4 I 1.) What shall be a Purchase.

IF there are articles for a purchase, the vendor stands seised in trust for the purchaser, before a conveyance executed. *Ca. Ch. 39. 2 P. W. (629.) Vide ante, (2 C 2.—2 T 5, &c.)*

And if the purchaser devises the land, it shall be decreed in equity. *R. Ca. Ch. 39. D. Fra. Earl of Cov. 4. 2 Ver. 680. Eq. Ca. 78. 2 P. W. (631.)*

So, if a man purchases a copyhold and has a surrender, but the vendor dies before the admittance of the surrenderee. *Ca. Ch. 39. 3 Ch. R. 4.*

So, if a man agrees to sell or make a mortgage for money; he stands seised in trust for the vendee. *Ca. Ch. 171.*

If a man agrees to pay 800*l.* for four houses in *A.*, which before a conveyance are destroyed by an earthquake; payment shall be decreed. *R. 2 Ver. 280.*

Tho' *A.* covenants for *B.* to pay, and has not affets for *B.* in his hands. *2 Ver. 280.*

So, if by marriage articles money is agreed to be vested in the purchase of lands; it shall be considered as a purchase, and decreed to him who will be entitled to the land. *R. 2 Ver. 101. R. Eq. 4tr. 175.*

So, if *A.* gives a bond to surrender a copyhold to *B.*, he shall be deemed a trustee for *B.* *R. Eq. Ca. 62.*

If *A.* agrees for a purchase with *B.*, it shall be decreed, if *B.* can make a title at the time of the decree of the report, tho' he had not a title at the time of the contract. *2 P. W. (630.)*

[If *A.* mortgages an estate to *B.*, who mortgages it to *C.* for 200*l.* charity-money, directed to be laid out in purchase of lands in fee, and *C.* leases the estate to *A.*'s heir for five thousand years, for 12*l.* per ann. the three first years, and 10*l.* per ann. for the remainder of the term, and if the 200*l.* repaid in the three first years, the premises to be re-conveyed; if it is not so paid, it shall be deemed an absolute purchase. *Miller v. Lee, H. 1742, 2 Atkyns, 494.*]

[Purchaser not entitled to a conveyance of part of a copyhold estate, tho' answering the general description in the advertisement of sale, as it was not in the contemplation of either party, at the

time of the purchase or conveyance; purchaser being referred to a more particular description, which did not include that part, and the surrender having been made accordingly from his own instructions. *Calverley v. Williams*, 1 *Ves. jun.* 210.]

[Any person undertaking to describe, bound by the description, whether conusant or not. *Ibid.* 213.]

(4 I 2.) Who shall be a Purchaser.

Every one who comes to an estate in land for a valuable consideration *bonâ fide* paid, shall be a purchaser; as, if land is settled upon a person, for money paid, in fee, in tail, for life, or for years.

[And this, tho' the consideration was much less than the real value. *Ambler*, 764.]

Or, in consideration of a marriage to be had,

So, if a lease be, rendring full rent, without fine; the lessee shall be a purchaser, and shall avoid a voluntary settlement. 2 *Ver.* 327.

So, a woman who has an agreement for a jointure, shall be a purchaser, if the portion is paid. *R. Ca. Ch.* 100.

So, if the father covenants to pay it, tho' it does not appear to be paid; for security is payment. *R. Ca. Ch.* 99. *Vide ante*, (3 Z 3.)

So, upon an agreement for a jointure, the issue of the marriage, claiming lands by such agreement, shall be purchasers. *R. Ca. Ch.* 255.

So, if a tenant in fee agrees with *A.* and *B.* to take them partners for 21 years in mines, which they are to search for and work, and he to have a tenth of the profit; *A.* and *B.* having laid out 120*l.* in the search of a mine, are in the nature of purchasers, and shall avoid a voluntary settlement. 2 *Ver.* 327.

If the husband makes a jointure, and it is agreed that he shall have the portion of his wife, but he dies before any assignment, &c. to him; it shall be decreed to the representative of the husband; for he is in the nature of a purchaser. *F. g.* 211.

So, if tenant for life, with power to make a jointure, marries and dies before the jointure is compleated; the wife shall have the privilege of a purchaser. *Ibid.*

But if a woman, having land conveyed to her, takes a husband, who makes a jointure, but no settlement is made or agreed to be made of the wife's land; the husband shall not be relieved, as a purchaser of those lands. *F. g.* 212. 217.

(4 I 3.) When a Purchaser shall be relieved against Incumbrances.

A purchaser *bonâ fide* may by an old mortgage, statute, or judgment, &c. protect himself against a mesne incumbrance. *R. Ca. Ch.* 36. *Vide ante*, (I 5.—4 A 4. 10.) *Ca. Ch.* 267. *Vide post.* (4 I 11.)—*Vide Covin.*, (B 3.)

And if he is a purchaser without notice, he may plead that to a bill for discovery of his title. *Vide ante*, (I 1.)

And if he has deeds in his hands, which shew a title in another, he need not discover them. *R. Ca. Ch.* 69.

Tho' obtained by artifice. 2 *Ver.* 159.

So, he need not discover where his land lies, or who is the tenant, in

in order to have execution of a judgment, statute, &c. *R. 2 Ca. Ch.* 47, 48.

So, a purchaser shall have the benefit of an old mortgage, &c. assigned for him, tho' nothing is due upon it. *R. 2 Ver.* 159.

[And he may protect himself against dower, by having got an assignment of it, if it existed before the wife's right to dower. *Att-bler*, 6.]

If the vendor was seised in trust for another; a purchaser for a valuable consideration, without notice of the trust, shall not be subject to it. *3 Ca. Ch.* 123. *Vide Uses*, (D 2.)

So, if a trustee, in consideration of a marriage with his daughter, covenants to stand seised to the husband for his life, and afterwards to his daughter, not having notice of the trust; neither the husband nor the wife shall be subject to the trust. *Semb. 2 Rel.* 781. l. 15.

If a man articles for making a marriage settlement, and afterwards mortgages the estate to *B.*; the mortgagee without notice shall enjoy against a settlement subsequent. *Semb. 2 Vent.* 343.

[*A.* by settlement after marriage (not being indebted) conveys to trustees to family uses, reserving a power to sell, "but covenanting that the purchase money should be paid to the trustees to be laid out to the same uses:" he sells to *B.* who has notice of the covenant, but pays his money to *A.* who dies insolvent; *B.* shall not be obliged to repay the money, the settlement being voluntary, and fraudulent as against purchasers. *2 Brown*, 148.]

If a settlement is for payment of debts, where no debt is expressed, nor creditor a party; a purchaser without notice shall not be subject, nor shall a creditor have relief against him. *Ca. Ch.* 249.

If *A.* purchases, having notice of an incumbrance, and afterwards sells to *B.* without notice; *B.* shall have relief, but *A.* shall make satisfaction out of his purchase money. *R. 2 Ver.* 384.

If a purchaser of a term erects new buildings, he shall have relief against a dormant title, of which he had no notice, *pro tanto* as he expended. *R. Lev.* 152.

If a bill is for the examination of witnesses to a will in *perpetuam rei memoriam*; it shall not be decreed against a purchaser without notice. *Eq. Abr.* 333.

So, if a purchaser gives security for the purchase money, and before payment the land is evicted; the purchaser shall be relieved from his security for the payment. *R. 2 Ca. Ch.* 19.

Tho' the covenant in the deed of purchase was only against all claiming under the vendor, and the eviction was by a title paramount. *R. 2 Ca. Ch.* 19.

[But where a purchaser of a settled estate (without notice of a rent charge granted by tenant for life,) transfers stock to the trustee under the settlement for payment; the tenant for life afterwards grants an annuity to one who had no notice of the transaction; if the purchaser of the estate be evicted by the grantee of the rent charge, he has no lien on the stock transferred. *1 Brown*, 301.]

So, a purchaser shall be aided against him who, having notice of his own title, suffers the purchase to proceed, without giving notice to the purchaser. *R. Eq. Ca.* 37. *Vide post.* (4 W 28.)

[If a mortgagee present at a treaty for marriage of mortgagor's son, conceals his mortgage, and assures the father that he will trust his personal security, the son, wife and issue, shall hold the lands against the mortgagee. *Berrisford v. Milward*, T. 1740, 2 Atkyns, 49.]

[A purchaser for a full consideration shall not be prejudiced by the mistake or ignorance of some of the parties to the conveyance of their claim under a marriage settlement. *Malden v. Menil*, P. 1737, 2 Atkyns, 8.]

(4 I 4.) When not.

But if a purchaser has notice of a trust, he shall be charged with it in equity. R. 2 Ver. 384. *Vide Uses*, (D 2.)

So, if A. articles for the granting of a lease, and afterwards sells the land to B. for a valuable consideration, who has notice of the agreement; B. shall be decreed to grant the lease. R. 2 Rol. 781. l. 10. *Lane*, 60.

[If tenant for life covenants to renew a lease, and his son tenant in tail, and entitled to his estate, afterwards covenants also, and then sells the estate to A. who has notice of such covenant, and an allowance for it in the purchase; A. is bound to renew. *E. Brook v. Bulkeley*, T. 1754, 2 Vesf. 498.]

[Where tenant for life granted leases for lives under a power, and bound himself on the dropping of a life to grant a new lease with the same provision, for renewal on the death of any person to be named in any future lease, and afterwards joined in a sale; tho' the power is exceeded, yet if a life drops in the life of the lessor, the purchaser having notice must specifically perform by granting a new lease with the same provision. *Taylor v. Stibbert*, 2 Vesf. jun. 437.]

So, if land is devised to be sold for payment of debts; a purchaser, with notice that the debts were before paid, or that the personal estate was sufficient for the payment, ought to re-convey to the heir. R. 2 Ca. Ch. 116. 1 Ver. 487.

If A. has a debt due to him by statute from B., and upon a mortgage by B. engrosses the mortgage-deed, without discovering his statute; he shall not extend his statute against the mortgagee. 3 Ca. Ch. 85.

If the devisee of a college lease, in trust for his son, renews in his own name, and afterwards mortgages to B. who had notice of the will; B. shall take it, subject to the trust. 1 Ver. 486.

If the lord of a manor leases a tenement to his daughter for 99 years, and afterwards sells the manor to B., who has notice and takes a bond that the daughter shall surrender at her full age; B. shall take, subject to the lease, which was an advancement for the daughter. 1 Ver. 467.

If to a bill the defendant pleads that he is a purchaser for a valuable consideration; the plaintiff may by a new bill charge, that he was a purchaser with notice, and require an answer of the defendant to that. Ca. Ch. 252.

[A man cannot defend himself in equity as a purchaser for a valuable consideration, under articles only: but if injured, must sue at law on the covenants. *Brandlyn v. Ord*, M. 1738, 1 Atkyns, 671.]

[The

[The court will not decree a voluntary conveyance to be delivered up to a purchaser on valuable consideration, unless fraud appears. *Oxley v. Lee*, H. 1736, 1 *Atkyns*, 625.]

[If the purchaser of lands in *Middlesex* knows they are charged with an annuity, he shall pay it, tho' the grant was not registered according to 7 *Ann. c. 20. Cheval v. Nichols*, in *Sc. M. & G. Str.* 664.]

[If a man after marriage, in consideration of 100*l.* paid by his wife's mother, settles 100*l.* *per ann.* on himself for life, remainder to his son, &c. and his mother joins in the conveyance, and thirteen years after he mortgages; mortgagee shall not foreclose. *Jones v. Marfb*, H. 8 G. 2. *C. T. T.* 64.]

What shall be sufficient notice, *vide ante*, (I 1.—4 C 2.)

(4 I 5.) When a Purchaser may take in prior Incumbrances.

So, if a purchaser of lands incumbered takes an assignment of the incumbrances paid with his money; it will be well, tho' all the incumbrances are not discharged. *R. 2 Ca. Ch.* 205.

So, if a purchaser of a reversion upon an estate for life, under a decree of *Chancery*, pays his money, and then the life falls; he shall not be compelled to take his money back again with interest. 1 *Ch.* *R.* 75, 76.

(4 I 6.) When he ought to discharge prior Incumbrances out of the Purchase Money.

If there is a trust for payment of debts, generally; a purchaser shall not be affected, tho' he has notice. 1 *Ver.* 260.

[Where the first trust is for payment of debts, the purchaser is not bound to look to the application of the purchase money. *Williamson v. Curtis*, at the *Rolls*, 3 *Bro. C. C.* 96.]

Tho' more is sold than is sufficient to pay the debts. 1 *Ver.* 303. *Semb. cont.* 1 *Ver.* 487. *Vide ante*, (4 I 4.)

But, if the trust is for payment of debts mentioned in a schedule, a purchaser ought to apply the whole money paid by him to the debts, otherwise he shall be affected by the debts not discharged. 1 *Ver.* 303, 260, 1. *Lloyd v. Baldwin*, M. 1748, 1 *Ves.* 173. [*Vide Ambler*, 188, 189. 1 *Brown*, 186.]

So, if an act of parliament enables a tenant for life to raise money for rebuilding and stocking a printing-office, burnt down by fire; the mortgagee, who advances money upon this security, shall be affected, if the monies advanced are not applied to this particular purpose. *R. 2 Ver.* 6.

So, if a termor devises 2000*l.* for his daughters' portions out of the profits, and his executor mortgages to *A.* who has notice of the devise; *A.* shall take, subject to the devise, tho' the executor had full power to sell the term. *R. in Parliament*, 2 *Ver.* 445.

So, if an executor sells a term to *A.* who has notice of a bond debt due from the testator to *B.*, and pays the purchase money to the executor, who commits a *devastavit*; *A.* shall be subject to the demand of *B.* for the term was assets, and *A.* a party to the *devastavit*. *R. 2 Ver.* 616.

If a man surrenders a copyhold to the use of himself for life, and after-

afterwards to *A.* (a relation of his wife's) in fee, who is admitted, and afterwards, upon a second marriage, surrenders the same copyhold to the use of the second wife and her children; she shall not be relieved against *A.* *R. 1 Ver. 365.*

If tenant in tail of lands by devise, charged with 500*l.* to a charity, levies a fine to the use of himself in fee, and afterwards makes a mortgage or sale; a purchaser by fine and non-claim shall not be excused from paying the 500*l.* for the title of the vendor has the same commencement with the charity; and therefore, all purchasers having notice of the will, ought to contribute in proportion. *R. 2 Ver. 662.*

(4 I 7.) Incumbrances are to be discharged in Proportion.

If, upon a purchase, land is settled upon *A.* for life, and afterwards to *B.* in fee; prior incumbrances ought to be discharged in proportion. *Vide ante* (2 I).

So, if a settlement is made upon a wife for jointure, and afterwards to the issues of the marriage; incumbrances afterwards discovered shall be divided in proportion; for the wife ought not to be excused *in toto.* *1 Ver. 440.*

(4 I 8.) The Purchaser of a Reversion shall not controvert the Title of the particular Estate.

If a man purchases a reversion after the death of *B.*, who claims an estate for life; *B.* shall be established for his life in his possession against the purchaser, without an examination, whether he had a good title. *2 Ver. 279.*

(4 I 9.) What Estates are within the Consideration of a Purchase.

If a father or other ancestor lineal makes a settlement upon the marriage of his son, grandchild, &c. all limitations to his children or their posterity are within the consideration of the settlement. *Per Cowper, Eq. Ca. 132.*

(4 I 10.) What not.

But all limitations, after failure of such issue, to collateral kindred, are voluntary, and out of the consideration of the marriage settlement. *Eq. Ca. 132. P. W. 256.*

Otherwise, if the father and son, who make the settlement, have both any interest. *2 P. W. 256.*

(4 I 11.) Purchaser without Notice.

A purchaser, without notice of a prior incumbrance, shall not be impeached or prejudiced by it in equity. *Eq. Abr. 333. Vide ante, (4 I 3.) Vide Notice, ante, (4 C 1, &c.)*

Nor, discover his title, nor lose any advantage which he has by law. *Eq. Abr. 333.*

[Defendant stating by answer a purchase for valuable consideration, without notice, shall not be compelled to answer farther. *Jerrard v. Saunders, 2 Ves. jun. 454.*]

[Devise

[Devise to trustees and their heirs in trust to receive and pay over rents and profits to *A*, a *feme-covert* for life, for her separate use, and after her decease, to convey to her daughters as tenants in common in tail, remainder over. Held that *A*. took an equitable estate for life, and might by lease and release make a tenant to the præcipe for an equitable recovery; that each daughter took a vested estate when she came *in esse*, subject to be divested, as the number increased; that the conveyance in execution of the trust need not wait the death of *A*. *Burnaby v. Griffin*, 3 *Ves. jun.* 266.]

(4 K) Recovery, Common.

(4 K 1.) Of what Effect it is in Equity.

A Common recovery by a *cessuy que trust* shall have the same operation upon the trust, as it shall have by law, being suffered of an estate at law. *Ca. Ch.* 49. *Vide ante*, (3 N 8.)—*Post.* (4 S 3, 4.)

[A recovery will bar equitable as well as legal remainders, but the estates must be completely legal or completely equitable; therefore, where there is an equitable estate for life, with a legal estate tail, the recovery will not operate. 1 *Brown*, 72. 75. *Ambler*, 545. 699.]

[If there be a limitation in a will to *C*. and his heirs, to the use of him and his heirs, in trust to pay debts, and then in trust for *D*. and the heirs of his body, and in default remainder to *C*. and his heirs, provided he marry *M*., and *D*. suffer a recovery, it bars the remainder to *C*. which was of an interest distinct, either from the legal estate or the use. *Robinson v. Cuming*, P. 1739, 1 *Atkyns*, 473.]

(4 K 2.) When a Defect of it shall be aided.

If a common recovery is suffered pursuant to an agreement with him, who had power to suffer a recovery, it shall be aided in *Chancery*, tho' it was suffered by a tenant for life, the agreement being with tenant in tail, who was dead at the time of suffering the recovery. *R. Ca. Ch.* 49.

Tho' the agreement was voluntary, without a valuable consideration. *Ca. Ch.* 49.

(4 L) Release.

(4 L 1.) When it shall be avoided.

(4 L 1.) *If it be obtained by fraud.* **C**hancery will relieve against a release obtained by fraud; as, if it be upon a suggestion of a falsity, or a suppression of the truth; as, if a man obtains a release, upon a suggestion that a will was revoked. 1 *Ver.* 20. *Vide ante*, (2 C 12.—2 T 11.—3 M 1, &c.)

If a man releases the arrears of a legacy (being 100 *l*.) upon a suggestion that he will pay costs, if he joins with the other legatees in a suit. 1 *Ver.* 32.

If a man gets a bond for 200 *l*. to be delivered up, and a release of all demands upon payment of 20 *l*. where the obligee was superannuated, tho' the obligor insists that he was a relation, but does not

not prove any mention thereof at the time of payment. *R. Eq. Ca. 119.*

If *A.* pays 200 *l.* to the wife executrix of *B.*, in satisfaction of 300 *l.*, and the wife releases the 300 *l.*, and the children of *B.*, for whom the 300 *l.* were assigned in trust, do not consent; *A.* shall pay the other 100 *l.* *R. Eq. R. 89.*

[A release procured from a person immediately on his coming of age, always gives a suspicion of fraud, especially if no accounts are settled, or account in writing produced. *Stedman v. Palling, H. 1746, 3 Atkyns, 423.*]

[But after a long acquiescence, the court will not set it aside against the representative, against whom no fraud is charged, till on an account taken before the master, it shall appear to have been unfair. *Ibid.*]

[Release executed by a party in gaol, void. *Semb. 1 Ves. jun. 43.*]

(4 L 2.) *Or, extends beyond the intent.*] So, if a release extends beyond the intent of the parties, it shall be avoided in equity; as, if a widow, who had a settlement of an estate for her jointure, releases all demands to the executor of her husband, and then the inheritance of the husband is evicted, and he appears to have had only a term for years, she shall not be barred of the term by this release. *R. Ca. Ch. 47. Vide ante, (2 T 3.)*

If *A.* releases all demands to *B.* upon an award made upon a submission concerning legacies, or other different matter; it does not bar him as to a trust of the land. *R. 2 Ca. Ch. 126.*

So, a general release does not bar when made upon another occasion. *2 Ca. Ch. 126.*

So, a release by will to *A.* of all debts, accounts, and demands against him, does not discharge *A.* of a chest of jewels of the testator, in his custody. *Dub. 2 Ver. 114.*

(4 L 3.) *Or, obtained with intent to defeat a prior agreement.*] So, if a release is clandestinely obtained to defeat a prior agreement, it shall be avoided in equity; as, if *B.* agrees by articles on the marriage of *C.* to settle 100 *l. per ann.* after his death upon *C.* and his heirs, and afterwards *B.*, upon pretence of a greater advantage, obtains a release from *C.*; the release shall be avoided, tho' the estate was to be settled in fee, and not upon the issue of the marriage. *R. 1 Ver. 241.*

If *A.* agrees to sell an estate to *B.*, which was mortgaged to *D.*, and afterwards releases his equity of redemption to *D.*, without a new consideration. *R. Hard. 320.*

A fortiori, if he releases to *D.* pending a bill for a performance of the purchase. *Hard. 320.*

[If there is an assignment of a bond in trust for the benefit of others, whether with or without consideration, precedent to a release, the obligee cannot release; nor can it operate to the releasee, as he must be presumed to have notice of the assignment, being a trustee in it. *Bower v. Swadlin, M. 1738, 1 Atkyns, 294.*]

[Release after a general assignment no answer to the assignee, if there were notice of the assignment. *1 Ves. jun. 43.*]

(4 L 47) When it shall not be avoided.

But a release shall not be avoided, upon pretence that it was fraudulent, where there is a subsequent release to the same intent, which is not prayed to be avoided by the bill. 1 *Ver.* 86.

So, if there be a bill by *A.* and *B.* for an account of the profits of an office in which they are joint-tenants, and one releases to the defendant *pendente lite*, the release shall not be avoided; and if *A.* brings a new bill against *B.* and the other defendant, which suggests combination between them; the prior defendant may plead the release to the second bill; for, being a bar in law, it shall not be avoided by a bare suggestion. *R. Hard.* 168.

[A release to one obligor is a release to both, in equity as in law. *Bower v. Swadlin, M.* 1738, 1 *Atkyns*, 294. See 1 *Lord Raym.* 420. 690.]

(4 M) Restitution.

If a person is tortiously ousted of his office, without process at law, equity will direct that he be restored to his office, and that the wrong-doer shall account to him for the profits till the title can be tried or determined by law. *Ch. R.* 50.

(4 N) Rent.

(4 N 1.) When recovered in Equity, tho' there is no Remedy by Law.

RENTS shall be recovered in equity, when there is no remedy for it at law; as, a rent-sock shall be decreed, tho' the grantee never had seisin. *Ca. Ch.* 79. 147.

So, if rent was constantly paid, till the last 12 years; the arrears and the accruing rent shall be decreed, tho' the deed by which it was created be lost. *R. Ca. Ch.* 120. 1 *Ver.* 359.

[If thro' process of time the remedy at law is lost, or become difficult, equity will give relief on the foundation only of the payment of the rent for a long time, or where the nature of the rent is not known, so as to be set forth, but then all the terre-tenants must be brought before the court. *Benson v. Baldwin, P.* 1739, 1 *Atkyns*, 598.]

So, if there be no attornment to the grant, the rent shall be decreed. *Ca. Ch.* 147.

So, if a fine for raising of a rent is defective, it shall be aided. 3 *Ca. Ch.* 92.

So, if *A.* grants several annuities out of a term, and then assigns the term to *B.*, tho' the grants are void for uncertainty in the *habendum*, they shall be decreed against all claiming thro' *B.* 1 *Ch. R.* 8.

So, if *A.* grants an annuity in trust for *B.*, and afterwards sells to *C.*, having notice, who afterwards obtains a release from the trustees, without the consent of *B.*, tho' the term for which the annuity was granted be expired, *B.* shall be aided against the release, and the land shall be charged with all arrears, tho' the term be expired. *R. Ch. R.* 411. 2.

If *A.* surrenders a copyhold to *B.* in fee, rendring a rent of 5*l.* per ann. to *A.* and his heirs, and assigns the rent to *D.*, who is admitted to it; equity will enforce payment of the rent to *D.*, tho' an admittance is not a proper title to the rent. *R. 2 Ver. 16.*

If a lessor, in consideration of an improvement, covenants to grant a subsequent lease at the prior rent; an assignee of the reversion shall be decreed to do it. *Ibid. 447.*

So, if a rent is devised out of a rectory to *B.*, for which he cannot have any remedy by distress; a court of equity will decree not only the rent *in futuro*, but all arrears, tho' there was no remedy for them at law. *R. Ca. Ch. 79.*

So, if there is a lease for years, rendring 40*l.* per ann. rent, and the lessor settles the land upon *B.* and his heirs male upon his marriage with *A.*, and it is agreed that *A.* shall have the 40*l.* per ann. for life; it shall be decreed, tho' *A.* has no remedy by distress. *R. 1 Ch. R. 5.*

So, if the lands out of which the rent issues are mixt with others, whereby no distress can be taken for it. *1 Ch. R. 61. 67.*

If a lease of an incorporeal thing is assigned, and the assignee enjoys; he shall be decreed to pay the rent, tho' not bound by law. *R. 2 Ver. 423.*

[A mere grantee of the crown, without aid of parliament, of rents of a manor where there are no demesne lands to distrain on, may have relief in equity. *D. Leeds v. Powell, M. 1748, 1 Vef. 171.*]

So, if there be a devise to *A.*, paying a rent-charge to *B.*, who dies; his executor shall have relief in equity for the arrears, tho' he does not allege want of distress. *R. per Mast. of the Rolls, 2 Ver. 386. Semb. cont. per Ld. K. Wright, 2 Ver. 382.*

So, if the assignee of a term rendring rent assigns over, the lessor shall have remedy against him in equity for the rent, for so long as he held the land. *R. 1 Ver. 165. [Valliant v. Dodemede, P. 1743, 2 Atkyns, 546.]*

[But the assignee is not liable to the rent incurred after the assignment by him to another. *Ibid.*]

[If *A.* makes a lease of a coal-mine, reserving rent to *B.*, who declares a trust of this lease, that he is trustee for five persons, they enter and take the benefit, then *B.* becomes insolvent, the mine unprofitable, and the partners abandon it; the *cestui que trusts* shall pay the arrears during the time they concerned themselves in taking the profits. *Per Talbot C. on appeal from the rolls. Clavering v. Westley, T. 1636, 3 P. W. 402.*]

So, if the lessee assigns to *B.*, equity will oblige him to admit an attornment. *R. 2 Ver. 113. Vide post. (4 N 4.)*

So, a pension may be recovered in equity as well as in the spiritual court, or in a writ of annuity. *R. Hard. 230.*

Tho' payable out of a vicarage, which has only casual profits. *Ibid.*

(4 N 2.) Or, the Remedy by Law is not sufficient.

So, if the remedy at law be not sufficient; as, if a man devises a rent out of a rectory, and there is not glebe sufficient for a distress; the devisee shall be decreed to be paid out of the whole rectory. *R. Ca. Ch. 79.*

So,

So, an executor shall be decreed to pay the arrears due in the time of the testator terre-tenant. *Vide ante*, (3 G 2.)

So, if a terre-tenant assigns his estate to prevent a distress for rent, the grantee shall be aided. 3 *Ca. Ch.* 91.

Or, permits the land to lie fresh, or to be depastured in the night only, to avoid a distress. 2 *Ver.* 382.

(4 N 3.) When it shall not be recovered in Equity.

But equity does not extend relief to the owner of a rent, when he has a remedy by law, tho' it be not so beneficial; as, if land subject to a rent be under sequestration, the court will not oblige the sequestrators to pay it out of the money received by them. 2 *Ver.* 713. *Vide infra.*

So, if land subject to a rent be aliened by parcels to several persons, equity will not allow the recovery of the whole against one. *Eq. Abr.* 33.

The grantee of a rent shall not have a remedy in equity for the rent, merely for the want of a distress, if the want of a distress be not caused by fraud or other default in the terre-tenant. *R. Ca. Ch.* 147. *R.* 2 *Ver.* 382.

So, where the lessee was ousted by the usurpers, and the estate sold, the lessee was relieved against the lessor, after the restoration. *R. 3 Ch. R.* 16.

So, if rent be recoverable by distress at law, the party shall not have aid in equity to have possession, or a receiver appointed. 2 *Ver.* 613. 382.

So, rent shall not be decreed in equity, where it has not been paid for 30 years. *Ca. Ch.* 184.

So, rent shall not be decreed to the executor, where the lessor dies on the last day of payment before sun-set. *R. Sal.* 578.

So, equity will not charge land with payment of rent to such a manor. *R. Ray.* 221.

So, generally the person shall not be subject to the rent, where the land only was charged. *Ca. Ch.* 145. 185.

So, if *Blackacre* and *Whiteacre* are subject to a rent, and *Blackacre* is purchased by *A.*, and the vendor covenants that it shall be discharged of the rent; it shall not be decreed that *Whiteacre*, afterwards purchased by another person, shall stand charged with the whole; for *A.* has remedy upon the covenant only. *R. Hard.* 87.

(4 N 4.) *Against an assignee.*] So, a rent shall not be decreed against the assignee of a wine-licence lease, who purchased without notice of the rent; for the rent does not run with the licence, but is due upon the contract only. *R. Hard.* 88.

So, an assignee shall not be prevented of a benefit, allowed by law, for the avoiding of a rent. 2 *Ver.* 423.

An assignee shall not be relieved against a rent, or covenants, recovered against him at law, tho' he took the assignment by way of mortgage, and never was in possession; for it was his folly to take an assignment of the whole term, and not an under-lease. *R.* 2 *Ver.* 275. 370.

So, a lessee shall not be compelled to surrender to the lessor, to enable

able him to renew a college lease, if there be no agreement for it; tho' the lessor offers to grant a lease *de novo* to the same effect. *R. 2 Ver.* 383.

(4 N 5.) When apportioned in Equity.

A rent may be apportioned by a decree in equity, where it shall not be apportioned at law. *Ca. Ch.* 32. *Vide ante* (2 E).

As, if a right of common is evicted, tho' it be not an eviction of the land. *Ca. Ch.* 32. 3 *Ch. R.* 11.

So, if by ancient composition between two abbies, the lands of one are discharged of tithes, by payment of 26 *l. per ann.*, and the lands come into the hands of divers patentees; the composition shall be apportioned. *R. in Excheq. Sav.* 5.

But if, for non-payment of rent the lease is avoided in law, and an assignee of part prays to be relieved, he ought to pay all arrears, and repair, for the rent shall not be apportioned.

So, if a common be evicted, but the land is still equal in value to the rent, the rent shall not be apportioned. 3 *Ch. R.* 12.

[Where money is settled to be laid out in land, and in the mean time invested in government securities, and tenant for life dies in the middle of the half year, the dividend shall not be apportioned, but paid to the reversioner; in case of a mortgage it is otherwise. *Sherrard v. Sherrard*, *P.* 1747, 3 *Atkyns*, 502.]

[Where rent has been paid to receivers by tenants holding by demise determinable on the decease of tenant in tail, who died without issue, the rent shall be apportioned between the representative of tenant in tail and the remainder-man. 2 *Brown*, 659.]

(4 N 6.) When an Extinguishment prevented.

So, an extinguishment, or suspension of a rent, contrary to the intent of the parties, may be prevented in equity; as, if the purchaser of lands prevails with him who had a rent excepted out of the purchase, to join in a fine, in which two or three acres, out of which the rent issued, are contained; there shall be relief in equity. *R. Ca. Ch.* 273.

What will be an extinguishment or a suspension in law, *vide Suspension*.

What in equity, *vide post*. (4 N 8, 9.)

So, if a rent-charge be issuing out of lands devised for payment of debts, of which part are sold for such intent; the whole rent shall issue out of the residue of the lands. *Ca. Ch.* 295.

So, if a rent is augmented by encroachment, equity does not aid against the encroacher. 1 *Ver.* 517.

(4 N 7.) When a Stranger shall be aided against a Distress for Rent.

If the cattle of *B.* escape into land adjacent, whereupon the grantee of a rent-charge, out of the same land, which was in arrear for 20 years, distrains, *B.* shall be aided in equity. *R. Pr. Ch.* 8.

So, if cattle are lodged at an inn, for which rent is due, with the privity of the lessor; in case he distrains them for rent in arrear, the owner of the cattle shall be aided in equity. *Ibid.* 7.

(4 N 8.)

(4 N 8.) When Rent, or other Charge upon Land, shall be extinguished.

If a rent, or other charge would be extinguished, or suspended by law, it shall be also in equity; if there be no fraud or covin. *Vide ante*, (4 N 6.) *Vide Suspension*.

As, if 100*l.* be charged by will upon land, payable to *B.*, and the land afterwards descends to *B.* in fee; the 100*l.* shall be merged. 2 *P. W.* (604.)

So, if 100*l.* or other legacy be secured by a term, and the reversion descends or comes to *B.* in fee or in tail, to whom it was payable, and *B.* levies a fine, or suffers a recovery, before assignment of the 100*l.* to another, it shall be extinct. *Ibid.* (605.)

(4 N 9.) When not.

But there shall be no merger, if only an estate-tail comes to *B.*

So, if an estate in fee, or for years, be vested in trustees for securing 100*l.* legacy, and the estate afterwards comes to *B.* to whom it is payable. *R. 2 P. W.* (604.)

(4 O) Revocation.

(4 O 1.) When good, tho' all Circumstances are not pursued.

WHEN a power of revocation is good, and when extinguished, and when pursued, *vide Uses*, (L 2, &c.)—*Vide ante*, (4 H 1, &c.)

If a man makes a settlement, with power of revocation in the presence of three witnesses, and he revokes by a will subscribed only by two witnesses; this shall be sufficient in *Chancery*. *R. 2 Vent.* 350.

So, if a power of revocation be reserved upon tender of 12*d.* in one place, and the 12*d.* is tendred and accepted of in another place. *R. Ca. Ch.* 68.

(4 O 2.) *Where prevented by fraud.*] In all cases, where a man has a power of revocation, and he makes a revocation, but by the fraud of any one is prevented from pursuing all the circumstances in the power; it shall be allowed in equity. 3 *Ca. Ch.* 89. 108. 122.

(4 O 3.) *Or, accident.*] So, if he be prevented by accident, or the act of God; as, if a deed is directed by the party to make a revocation, and engrossed, and he dies before execution. 3 *Ca. Ch.* 69. 93.

If a man by sickness, or other accident, be disabled to make a tender in person, he shall be aided, if the tender is made by another. 3 *Ca. Ch.* 89. 109. 126.

(4 O 4.) *Or, necessity.*] So, if he be prevented by necessity; as, if a man has power to revoke by deed executed before six witnesses, of whom three are to be peers, and he executes his power in a foreign kingdom before six witnesses; it shall be aided, tho' neither of them was a peer, for it was not in his power. *R. 3 Ca. Ch.* 68. 90. *Eq. Ca.* 14.

If there be a power to revoke with the assent of three subsidy-men, it shall be aided, if it be done by the assent of three substantial men, who were of ability to be assessed to a subsidy, if there had been such a manner of taxation. 3 *Ca. Ch.* 90.

(4 O 5.) *Or, default of the party.*] So, if he be prevented by the default of him who has a benefit by the settlement to which the power is annexed; as, if *A.* makes a settlement upon *B.* and his children, with a power of revocation, and suffers the deed to remain in his custody, and, being inclined to revoke, sends to *B.* who refuses delivery of the deed, by which means the circumstances of the power are mistaken. 3 *Ca. Ch.* 67. 84.

So, if *B.* does any thing to prevent the knowledge of the circumstances of his power. 3 *Ca. Ch.* 84.

(4 O 6.) *Defective execution of a power of revocation aided.*] So, a defective execution of a power shall be aided in equity, for the relief of a purchaser, &c.; as, if the power be to revoke upon tender of 12 *d.* to *A.* in *Westminster*, and he tenders, and it is accepted by *A.* in another place. 3 *Ca. Ch.* 68. *Ch. R.* 38.

Tho' he be a purchaser with notice. *Per Treby*, 3 *Ca. Ch.* 89.

Or, where the settlement is for payment of debts. *Ibid.*

Or, for provision for younger children. *Ibid.*

If the power be to revoke by writing under hand and seal for a provision for younger children, and the party, being sick, gives instructions to counsel under his hand to be drawn up in form, which is drawn and engrossed, but before execution the party dies; it will be a good revocation in equity. 3 *Ca. Ch.* 69.

If a power be given to *A.* to make a jointure, and *A.* by articles covenants upon his marriage to make a jointure of such value, and afterwards directs a jointure to be made of such lands to that value, and after the deed is drawn, dies before execution; it shall be decreed in equity. *Eq. Ca.* 20.

If there be a power of revocation, and a subsequent settlement is made with all the circumstances required; it shall be a revocation, tho' there is no reference to the power. *R. F. g.* 218. *Vide Poirar, Vide ante*, (4 H 1, &c.)

(4 O 7.) When not good.

(4 O 7.) *In aid of a voluntary settlement.*] But a voluntary settlement by him who has a power of revocation, shall never be aided in equity, if it be not made pursuant to all the circumstances of the power. 3 *Ca. Ch.* 107. *Vide ante*, (2 C 8.—2 T 9.—4 H 9.)

And therefore, if there be a voluntary settlement with a power to revoke by writing with six witnesses; a will, by which the same estate is devised to others, executed in the presence of three witnesses, shall not be a revocation. *R. inter Bath and Montague*, 3 *Ca. Ch.* 86. 93. 107. 127.

Tho' the prior settlement does not appear to have been in the custody or memory of the testator. 3 *Ca. Ch.* 64. 86.

Tho' the prior settlement was for confirmation of a prior will, which is revocable in its nature. *R.* 3 *Ca. Ch.* 64. 86. 99.

So, if the power be to revoke upon tender of a guinea, and the party

party executes a deed to other uses, without any tender; it shall not be aided in equity. *Adm. 3 Ca. Ch. 70. 108. R. if the intent to revoke is not proved. 2 Ver. 69.*

If a wife has power to revoke in favour of her husband, and she sends several letters to counsel, to make a deed of revocation, but nothing is done, it shall not be aided. *R. Eq. Ca. 15.*

(4 O 8.) Who may make a Revocation.

The revocation ought to be made by those who have ability to make it by the settlement.

If two husbands and their wives make a conveyance, with power to revoke with the consent of their wives, to wit, *if they or either of them be living then to revoke*, if one of the wives dies, the husband surviving and the other wife may revoke. *R. 2 Rol. 178.*

(4 P) Satisfaction. See *supra*, (3 Y 10.)

IF a covenant, bond, &c. be satisfied, tho' not cancelled, equity will relieve the covenantor, obligor, &c. *Vide ante*, (2 X 3, &c.) Tho' satisfied by matter collateral. *Vide ante*, (2 X 5.)

[So, satisfaction may be presumed from length of time; as, where a bill of exchange has not been demanded of the acceptor for 20 years after his death, payment shall be presumed unless the contrary appear. *Ambler*, 231.]

[If a man leaves 520*l.* to five grand-daughters, and makes their mother executrix, and her husband possesses himself of the personal estate, and prefers all his daughters in marriage, giving them greater portions than their shares amounted to, and they acquiesce therein; they shall not come after his death to demand such shares. *Seed v. Bradford*, T. 1750, 1 *Ves.* 501.]

[If A. who by the will of B. to whom he is executor is to pay his aunt C. 300*l.* per ann., devises the residue of his estate to his mother and his aunt C.; this is not a satisfaction of the 300*l.* annuity, tho' the moiety of the residue is of greater value, for the value was uncertain. *Barret v. Beckford*, T. 1750, 1 *Ves.* 519.]

[Devise of residue of real and personal estate for life is not a satisfaction for a sum to be laid out in lands in fee by articles. *Alleyn v. Alleyn*, M. 1750, 2 *Ves.* 37.]

[If A. by marriage articles covenants that lands settled on his wife are of 1600*l.* value, and makes his will, ratifying the articles, and leaving his wife lands in B. for life; this devise is not a satisfaction of the articles. *Prime v. Stebbing*, T. 1752, 2 *Ves.* 409.]

[If A. has an estate in strict settlement, his first son tenant in tail, and afterwards on son's marriage they agree that A. shall have 800*l.* of wife's portion, and convey to trustees lands to secure 50*l.* per ann. to the son, and 800*l.* to his younger children; and A. afterwards makes his will, and leaves 700*l.* per ann. to his son, provided he settles the whole family estate to secure to B. 100*l.* per ann. out of said lands, and makes great provision for the son's children at 25 or marriage, and afterwards by deed, fine, and recovery, A. and son settle the estate strictly, making son tenant for life; the condition in the will being thus impossible, the 700*l.* annuity is a satisfaction

for the 50*l.*; had it not been for the last deed it would not have been a satisfaction, and the provision for the children being on a contingency, is not satisfaction for the 800*l.* *Matthews v. Matthews*, T. 1755, 2 *Ves.* 635. *Vide Dowder*, (E 3.)]

[A portion given by a father by *will*, is satisfied by a *portion* advanced in his lifetime. *Ambler*, 325. 1 *Brown*, 65. n.]

[But the devise of a *residue* of personalty, or of a *real* estate, is not satisfied by the portion. *Id. ibid.*]

[But a portion given by *settlement* may be satisfied by a *residue*; as, where there is a provision by marriage settlement, with proviso, that sums advanced should go in satisfaction unless *otherwise* declared, 4000*l.* left by will, subject to the life of the mother, and the *residue* of the personal estate being given by the will to a child entitled to the provision under a settlement, must go in satisfaction of that provision. 1 *Brown*, 63. 2 *Brown*, 388.]

[Where it is declared in a deed of settlement, providing portions for a daughter, that if any lands should *come* from the father, they should be taken as part of the portion: an estate tail being devised by the father, was considered as part satisfaction according to the value of it. *Ambler*, 325.]

[Where part of the wife's fortune was *settled* (after the decease of the husband and wife) on the children, according to *her appointment*, and the husband left a *larger provision* to trustees, to the use of the wife for life, remainder to the children, *as she should appoint*: this was held to be a *satisfaction* for the portions. 1 *Brown*, 82.]

[So, where by marriage settlement 10,000*l.* were to be raised for *younger children*; and the *settler*, by will, gave the younger children 2000*l.* each; this was held to be in part satisfaction. *Id.* 305.]

[But where the legacy does not come from the same person, or is not payable from the same fund as the portion by the settlement, it is *otherwise*.]

[Thus, where by settlement on the grandfather's marriage, his eldest son (the father) had a power of raising 2000*l.* to each of his daughters, and in pursuance of that power, on his own marriage, settled the 2000*l.*, and in his will gave 20,000*l.* out of his personal estate; this was held a cumulative provision, and not a satisfaction of the settlement. 2 *Brown*, 352. 529.]

[So, where the devise differs in circumstances from the settlement, it shall not be taken in satisfaction.]

[Thus where a bond was given by the husband on marriage, to leave the wife 300*l.* to be paid to her *within one month* after his death; and he by will gave her 500*l.* payable *six months* after his decease; this was held not to be in satisfaction. 1 *Brown*, 129.]

[So, where money was to be raised by a trust term, which descended, and the owners made no appointment, legacies to the heir at law were held not to be a satisfaction. *Id.* 133. n.]

[So, where testator gave a bond to trustees, conditioned that his executors should pay 500*l.* to a natural son at *twenty-one*; and by will he gave 15,000*l.* to trustees, to pay to the son a maintenance till *twenty-five*, and then to pay the whole to him with contingencies on marriage; this was held to be no satisfaction of the bond. *Id.* 295.]

[Where it was covenanted in a settlement, that the wife should not be

be barred of any thing the husband should give or leave by deed or will or otherwise, and he died intestate, a freeman of *London*, it was held that her shares, by the statute and custom, were not a satisfaction of the covenant. 2 *Brown*, 95.]

[Where a parent has made a will, in which he gives a legacy to a child, and afterwards pays a portion with that child, the portion will be presumed to have been meant in satisfaction of the legacy, unless there be sufficient evidence to repel the presumption. 2 *Brown*, 397.]

[But the father of a putative daughter paying a portion on her marriage, accompanying it with a declaration, that she shall have more at his death, is not a satisfaction. *Id.* 165. 519.]

[So, neither is the value of a beneficial lease granted to a natural son a satisfaction of a legacy given by a prior will of the putative father. 1 *Brown*, 425.]

[So, where a *stranger* gives a legacy in a prior will, and afterwards gives a portion with the same child; this is not a satisfaction of the legacy. 2 *Brown*, 499.]

[If a father having by his will given his son 500*l.*, afterwards take him into partnership, the stock amounting to 3000*l.*; this shall not be taken as a satisfaction of the legacy. 1 *Brown*, 555.]

[Covenant in marriage articles by the husband to pay his wife, if she should survive, 200*l.* as a jointure, and 50*l.* to provide herself with a house, yearly for life; afterwards, by will, he gave her for life an estate and house above the value of 100*l.* a-year, with the household goods, &c. and an annuity of 100*l.* commencing and payable at different times from those specified in the articles; held by *M. R.* not to be a performance, nor intended as a satisfaction. *Richardson v. Elphinstone*, 2 *Ves. jun.* 463.]

[Members of a society covenant mutually that their widows shall receive annuities from the society; payment from them is not a satisfaction of a covenant in the marriage settlement by the husband to pay his wife an annuity for her life, in lieu of all claim on his personality. *Rhodes v. Rhodes*, 1 *Ves. jun.* 96.]

[On deficiency of assets, marriage portion no satisfaction of a legacy to the wife from her father; the portion being less than the legacy, and having been paid absolutely to the husband on giving up a certain interest of his wife; the legacy being to [the wife for life, remainder to her children and grandchildren, remainder over, and being expressly in satisfaction of another distinct interest of the wife. *Baugh v. Read*, 1 *Ves. jun.* 257. 3 *Bro. Ch. Ca.* 192. *S. C.*]

[Agreement between mother, being tenant in fee and in tail, and her son, that she would convey to him the estate in fee, and that he should, when in possession of the estate tail at her death, pay his sister 20,000*l.* "for her fortune and portion;" the agreement was never executed; but the mother afterwards made a general devise in favour of her son, charged with a legacy of 20,000*l.* to her daughter "for her portion, fortune, and advancement;" the legacy held a satisfaction of her interest under the agreement. *Finch v. Finch*, 1 *Ves. jun.* 534. 4 *Bro. C. C.* 38. *S. C.*]

[In respect to satisfaction or election, the interest must be clear; if

if it is devisee cannot take under the will, and also in opposition to it, even his own property intended by testator to go otherwise. 1 *Ves. jun.* 534. 4 *Bro. C. C.* 38. *S. C.*]

[Bond to pay an annuity, till a legacy recited to have been bequeathed by the last will of obligor to obligee should be paid. By a previous will he had given a legacy; but that was revoked by a subsequent will, and a less legacy given payable six months after testator's death, "over and above the annuity, which I have secured to him for his life." The annuity and bond were assigned by the obligee, "as some provision for his mother to be received by her during the life of the obligor, as fully and beneficially as it could have been by the obligee." The bond and assignment were put into the possession of the testator, and continued so till his death; the legatee held entitled to the legacy with interest, if not paid at the time, and also to the annuity for his life in trust for his mother. *Crosby v. Murray*, 1 *Ves. jun.* 555.]

[A. devised to each of B.'s children 50*l.* to be paid to the father for their use; B. left to each of his children 260*l.* if they attained the age of 21; this held to be no satisfaction of the other legacies. *Pullen v. Cresy*, 3 *Anst.* 830.]

[Bankers on a deposit of money with them, gave notes bearing interest; the partnership was dissolved; one of the partners soon afterwards died, and his creditors were called by advertisement; another partnership was formed by the survivors and others, who re-issued notes of the former partnership, and paid the interest of the deposit notes for near two years, when they failed; the assets of the deceased partner held not to be discharged. *Daniel v. Cross*, 3 *Ves. jun.* 277.]

[Portions for children by the will of the parent presumed a satisfaction of a prior provision by settlement, unless clearly not so intended; the presumption is rebutted by slight circumstances; accounts in the testator's hand writing were admitted as evidence of the circumstances under which he made his will, but not to explain the will. *Hinchcliffe v. Hinchcliffe*, at the Rolls, 3 *Ves. jun.* 516.]

[Portions for children by the will of the parent held a satisfaction of a provision by settlement, on the intention; slight circumstances of difference, that would repel the presumption of satisfaction between strangers, are not sufficient in the case of parent and child. *Sparkes v. Cator*, at the Rolls, 3 *Ves. jun.* 530.]

[A negotiable bill of exchange not satisfied by a legacy. *Carr v. Eastbrooke*, 3 *Ves. jun.* 561.]

[A father by will gives the residue to his three natural children equally; he afterwards gives two of them (daughters) marriage portions; those portions shall not be held to be a satisfaction *pro tanto*. *Smith v. Strong*, 4 *Bro. C. C.* 493.]

Statute.

Vide Statute-Staple, (D 2, &c.)

(4 Q) Superfedeas.

When granted by *Chancery*.

IN vacation, a *superfedeas* may be sued in *Chancery*, to process out of another court; as, to a *capias* or *exigent* out of *C. B.* directed to the sheriff to take surety for the appearance of the party. *F. N. B. 236. A.*

Or, if he finds surety in *Chancery*, there shall be a *superfedeas* to the sheriff to set him at large, if he has taken him; if he has not taken him, not to arrest him. *F. N. B. 236. A. 237. A.*

So, upon an *audita querela* upon a statute merchant, &c. which is forged, &c. there shall be a *superfedeas* to the sheriff, that upon surety to appear and to pay the debt if he be condemned, he do not molest him. *F. N. B. 236. B. 240. A.*

So, it shall be granted to discharge one out of execution, where the execution is sued by an executor, upon a judgment by his testator, without a *scire facias*. *R. 1 Ch. R. 90.*

Or, to prevent execution, where the party has sued an attaint. *F. N. B. 237. F.*

Or, a writ of error, or an appeal. *F. N. B. 239. B. E.*

So, if a man be taken upon the statutes of provisors, for suing a citation of appeal to *Rome*. *F. N. B. 236. C.*

Or, upon the statute of labourers, for retaining the servant of another. *F. N. B. 236. D.*

Or, if a servant be sued for departing without licence. *F. N. B. 236. E.*

Or, an action be brought against sureties. *F. N. B. 237. B.*

Or, in any personal action. *F. N. B. 237. D.*

[If plaintiff in an action on the calico act, 7 G. 1. c. 7. §. 4. serves defendant with a copy of a writ, instead of summons and *pone*, or special *capias*, and afterwards gets the curfitor to alter the return of the original; the alteration is erroneous, and the writ shall be superseded. *Weavers' Company v. Hayward, T. 1746, 3 Atkyns, 362.*]

So, if surety be found in *Chancery*, a *superfedeas* goes to process upon an indictment before justices of the peace. *F. N. B. 237. C.*

So, it goes to a *capias pro fine*; if the plaintiff sues an *elegit*, or the defendant sues an attaint. *F. N. B. 238. A. C.*

In an appeal of rape. *F. N. B. 238. D.*

Upon an attachment, *supplicavit* of the peace, &c. out of *Chancery*. *F. N. B. 238. E. Vide post. (4 R.)*

If an inferior court entertain a suit where it has not jurisdiction. *F. N. B. 239. D. H.*

Or, if an ecclesiastical court proceeds after a prohibition. *F. N. B. 239. B.*

But a *superfedeas* shall not be allowed in *Chancery* upon an *exigent* after a *capias ad satisfaciendum*. *F. N. B. 237. A. B.*

Nor, shall it be allowed to a prohibition to an inferior court, for that it was granted after plea there, (tho' in such case it ought not to be granted,) without an *affidavit* that the cause arises within the jurisdiction. *1 Ver. 301.*

[The court will not on motion supersede a writ of replevin out of this court, unless a fraudulent use is made of it. *Anon. M. 1741, 2 Atkyns, 237.*]

[This court cannot grant a *superfedeas*, nor quash a writ *de excommunicato capiendo*, after the return, but it can before; the application after, must be to the King's Bench. *Ex parte Little, P. 1747, 3 Atkyns, 479.*]

[The court will not supersede special original, because it has been altered and amended by plaintiff's attorney with leave of the curitor, and afterwards revealed; for it is the course of the office, and even if it be after *oyer*, and copies delivered. *Smith v. Wilmer, M. 1747, 3 Atkyns, 595.*]

(4 R) Supplicavit.

ON surety of the peace or good behaviour demanded, the *Chancery* or *B. R.* will award a *supplicavit* to the sheriff or justices of the peace, or both, or to one justice of the peace, commanding him to take of such a one surety for the peace, &c. *F. N. B. 79. G. Vide Forcible Entry, (D 16, 17.)*

And upon that he shall have an *alias* and *pluries*, and afterwards an attachment against the sheriff, if there be any default in him. *F. N. B. 79. G.*

But before a *supplicavit* granted, the party, who demands it, must make an *affidavit* before a master in *Chancery*, that he does not pray it out of malice. *F. N. B. 79. H.*

And upon such *affidavit* the master will make his warrant, upon which one of the clerks of the office may immediately have a *supplicavit*.

[The court will not grant it on a Quaker's affirmation; for if the party complained of is not in court on exhibiting articles of the peace, an attachment goes on the oath of the complainant. *Ex parte Gumbleton, M. 1740, 2 Atkyns, 70.*]

Or, upon information to the court of ill behaviour, the court will grant a *supplicavit*. *2 Vent. 345.*

[*Supplicavit* (and so a rule for surety of the peace in *B. R.*) is never discharged, but on a strong case to shew falsity or contrivance. *King v. King, T. 1754, 2 Ves. 578.*]

[If one taken on a *supplicavit* continues in prison a year and a day, without fresh threatening or misbehaviour, he shall be discharged on small bail. *Grosvenor's Case, P. 1731, 3 P. W. 103.*]

(4 S) Tenant in Tail.

(4 S 1.) When his Estate is bound by his Agreement,

IF tenant in tail agrees to make a settlement of lands entailed, he shall be bound by his agreement. *R. 22 Car. 2. Ca. Ch. 171.*

So, if the issue in tail accepts of the recompence agreed to be paid to his father for such settlement, he shall be bound by it; for that makes it his own agreement. *R. Ca. Ch. 172.*

So, if tenant in tail covenants, upon valuable consideration, to levy a fine, and is decreed so to do, but dies before the fine is levied; the

the issue in tail shall be bound by it. *Per Lord Chan.* 28 Car. 2. *Ca. Ch.* 294.

So, if tenant for life, with power to make a jointure to the value of 1000*l.* *per ann.* settles lands, which are only 600*l.* and covenants to make it up 1000*l.*, his son being tenant in tail in remainder, shall be decreed to make the jointure up 1000*l.* *per ann.* 2 *Ver.*

379.

But generally, the issue in tail is not bound by the agreement of his father, to make a conveyance of the estate entailed. *R. Ca. Ch.* 172. *D. Ca. Ch.* 236. *Fra. E. of Cov.* 4, 5. 13.

Nor, by his covenant to suffer a recovery, where the tenant in tail was decreed to do it, and died in execution for not performing the decree. 2 *Ver.* 306. *R. Eq. Abr.* 265, 6.

So, if tenant in tail, with power to make a jointure, by articles before marriage agrees to settle a jointure upon the wife, without saying of what lands in particular, and dies before the jointure made, without issue; the jointure shall not be decreed against the wife of him in remainder, who had settled the same lands upon his wife for her jointure after notice. 1 *Ver.* 406, 7.

So, where a father settled lands for jointure of a second wife by lease and release, and covenanted for further assurance, and a fine was taken of the father, but he died before the fine was perfected; the master of the rolls would not decree, that the heir by the first marriage, who claimed by virtue of an entail, should perfect the fine. 2 *Ver.* 3.

So, if land be settled or devised to trustees in trust for *A.* for his life, afterwards to *B.* in tail, &c. a recovery by *B.* without the trustees does not bar the remainder. *Eq. Abr.* 256.

[So, where *A.* tenant for life, with remainder to *B.* in tail, committed a forfeiture, and *B.* in consideration of an annuity for the life of *A.* released; the release was held to be no bar to the heir in tail of *B.*, and *B.* was therefore decreed to make a good conveyance to *A.* during her life, altho' the release contained no covenant for further assurance. *Lewis v. Rogers*, 2 *Anstr.* 579.]

(4 S 2.) When his defective Conveyance shall be aided.

If tenant in tail makes a defective conveyance, it shall be supplied in *Chancery*; as, if upon marriage he makes a settlement by feoffment, and afterwards levies a fine, and devises to his younger son; the elder son of the marriage shall be aided against the younger. *Semb. Ca. Ch.* 240. *Vide ante*, (2 T 8.—3 N 2.—4 O 6.)

If he makes a devise to charitable uses, it will be good. *Ray.* 249. *Vide Uses*, (N 11, &c.)

If tenant in tail of an equity of redemption devises for payment of debts, it will be good. 1 *Ver.* 41.

So, if a copyholder in tail purchases the freehold of his copyhold, to him and his heirs, and afterwards for money sells to *A.* and his heirs, and conveys to him by a conveyance at common law; *A.* shall be aided against the issue in tail; for it being severed from the manor, there can be no recovery there. *Semb.* 2 *Ca. Ch.* 174.

[If tenant in tail conveys by lease and release, tho' without a covenant for further assurance, he shall be decreed in equity to make a valid conveyance. 2 *Anstr.* 585.]

(4 S 3.)

(4 S 3.) *Cestuy que Trust in Tail.*

A trust is a creature of *Chancery*, and cannot be entailed within the *ft. W.* 2. 13. *De Donis Cond.* 2 *Ca. Ch.* 64.

And therefore, an estate to trustees in trust for another in tail is not favoured. 2 *Ca. Ch.* 30.

(4 S 4.) *How his estate shall be barred.*] If *cestuy que trust* in tail suffers a common recovery, this bars the remainders over, tho' there was no legal tenant to the *precipe*; for a conveyance by *cestuy que trust* shall have the same operation upon the trust as his conveyance at common law, if the trust had been executed. *R.* 2 *Ca. Ch.* 64. 78. [1 *Brown*, 72.] *Dub. Ca. Ch.* 68. 213. *R.* 1 *Ver.* 13. 440. *R.* where it was upon a consideration. *Ca. Ch.* 49. 2 *Ver.* 132. *Eq. Ca.* 144. *Eq. Abr.* 255. 258. [*Vide* (4 K 1.)]

So, if tenant in tail in equity levies a fine, it shall be a bar to his estate, as a fine at law, if his estate was executed. *Ca. Ch.* 49. 213.

If he levies a fine, and five years pass after his death without issue, it shall be a bar to him in remainder. 1 *Ver.* 226. *Eq. Ca.* 144. *Eq. Abr.* 256.

So, his feoffment or bargain and sale bars the issue in tail. *Diſ.* 2 *Ca. Ch.* 64. 1 *Ver.* 440. 2 *Ver.* 133. *Cont. per Cowper*, 2 *Ver.* 552.

If the trustees join in a feoffment, which will not be a breach of trust. *R.* 2 *Ver.* 345.

So, a devise by *cestuy que trust* in tail, in trust for a good use, bars the entail. *Pr. Ch.* 228.

So, his agreement upon marriage, to make a settlement, binds the issue. *Semb. Ca. Ch.* 236. *Fra. E. of Cov.* 5.

So, if a voluntary agreement be made with a son tenant for life, to make him tenant in tail, and then the father dies, and tenant for life suffers a recovery; it shall be aided in equity. *R. Ca. Ch.* 49.

So, if *A.* upon his marriage covenants to surrender a copyhold estate to the use of him and his wife, and the heirs male of their bodies, and afterwards to the use of the heirs female of their bodies, and afterwards dies before a surrender, having a son and a daughter; a surrender by the son bars the entail to the daughter, where a custom to bar by recovery does not appear, and then a surrender is sufficient. *R.* 2 *Ver.* 704.

So, if a surrender be refused by the lord of the manor, a devise without a surrender shall be a bar to the trust in tail. *R.* 2 *Ver.* 585.

But if an estate be in trust for *A.* for life, and afterwards in trust for *B.* in tail, remainder over; a recovery by *B.* is not a bar; for it would not be a bar if the estate had been executed. *D.* 2 *Ca. Ch.* 64. *Eq. Abr.* 256.

So, if a fine be decreed for a particular purpose, it does not operate in equity to another intent. *R.* 2 *Ca. Ch.* 49. 2 *Ver.* 56.

So, if a father covenants to levy a fine to the use of himself in tail male, and afterwards to the use of the heirs female by the wife, whom he intends to marry, and dies before a fine levied, having a son and a daughter.

a daughter by his wife, and the son covenants to levy a fine for payment of debts; the daughter shall not be barred of the equity of the state tail by the covenant of the son, without a fine levied by him. *R. per Cowper, 2 Ver. 704.*

So, if tenant in tail for a valuable consideration, covenants to suffer a common recovery, and dies in execution for non-performance of a decree to do it; the issue in tail shall not be bound to do it. *1 Ver. 306.*

A decree against a tenant in tail to foreclose his equity of redemption, binds the issue in tail; for it being a right only in equity, may be there extinguished. *Ca. Ch. 220. Vide ante, (Y 2.)*

If tenant in tail covenants that he will not dock the entail, but afterwards suffers a recovery; a specific performance of the covenant shall not be decreed, but the party shall be left to law for damages. *R. 2 Ver. 635.*

[Devise in fee to pay debts, and then to the use of *A.* in trust for *B.* for life, remainder to the heirs male of his body: held to be an estate tail in *B.* *At the Rolls, Brydges v. Brydges, 3 Ves. jun. 120.*]

[To create a merge of the equitable in the legal estate by their union, the interest in each must be the same; an equitable recovery, therefore, held to bar an equitable remainder in tail, in the person who had the whole legal fee. *Ibid.*]

(4 T) Taxes.

IF a copyhold be surrendered to *A.*, provided that if *B.* pays him 20*l.* per ann. without deduction, *A.* shall re-surrender; *B.* shall not deduct taxes. *Dub. 2 Ver. 306.*

(4 V) Trial by Common Law.

When it shall be directed.

[THIS court will grant a new trial, where a court of law will not; tho' the judge certifies he is satisfied with the verdict: it will grant it to introduce new evidence, or answers to evidence, in matters of inheritance, in personal demands of value, in forgeries; wherever the conscience of the court is not satisfied with the grounds on which the determination is made at law, or an objection is made and supported by proof. *Stace v. Mabbot, 2 Ves. 552. Vide ante (X).*]

Chancery will direct a new trial, after a verdict, when it could not be by the rule of law: as, after a verdict for an avowant in *replevin*, (which is conclusive,) upon the seisin of the grantor of a rent-charge, the court will direct another trial. *R. upon an original Bill. 2 Vent. 351, 2.*

[So, if on issue directed the judge certify that the weight of evidence was against the verdict, a new trial will be granted, tho' it would not at law. *Ambler, 210.*]

If evidence was concealed at a former trial. *Ch. R. 41.*

If a verdict upon a *non est factum* is obtained by surprise, when the witnesses are dead. *2 Ver. 249.*

Or,

Or, a discovery is afterwards made of an alteration in a register; *Ec. 2 Ver. 285.*

So, where a question remains at law, it shall be sent to a trial; as, where a settlement is by way of use, and not a trust, and a question arises, whether the condition be broken without notice. *2 Ca. Ch. 109.*

[The court will not determine a fraud in procuring a will, without directing a trial at law. *Webb v. Claverden, M. 1742, 2 Atkyns, 424.*]

So, where *D.* has deeds in his custody, and will not restore them. *Ch. R. 41, 42.*

And *D.* shall be obliged to produce such deeds. *Ch. R. 42.*

If former trials upon the same issue have gone a contrary way. *2 Ver. 378, 419.*

[A new trial will be ordered for misdirection of the judge. *Ambler, 323.*]

[After trial in ejectment, neither party ought to bring a new ejectment without leave of the court; yet if there have been two trials by order and leave of the court, and verdict against verdict, and the cause set down to be heard, and one party brings new ejectment, the court will excuse the irregularity, as it will not occasion delay. *Sands v. Sands, T. 1750, 1 Ves. 495.*]

[The court, for the more solemn determination, will sometimes direct a new trial, without setting aside the first verdict, and then the first verdict may be given in evidence. *Baker v. Hart, T. 1747, 3 Atkyns, 542, 1 Ves. 28.*]

So, a court of equity may direct the trial in what county it pleases. *R. 2 Lev. 33.*

If a trial be directed, the parties must admit all that by the decree is directed to be admitted, otherwise they may be committed. *Ca. Ch. 267.*

But, after a trial at law, no cause shall be allowed for a new trial, which would not be sufficient for a bill of review; as, neglect of having his witnesses. *R. Ca. Ch. 43.*

Want of evidence known at the time. *Ibid.*

[The absence of a witness, whose testimony would only corroborate that of several others on a fact, is not, even in equity, a reason for granting a new trial. *D. Ambler, 323.*]

[The court will not grant a new trial, on a suggestion that the party was not apprized of a particular evidence, and therefore not prepared to give an answer; as, if one swears that a material witness was not in *England* at the time he swore to a fact. *Richards v. Symes, T. 1742, 2 Atkyns, 319.*]

That the defendant himself knew of a matter written by him in a letter before the trial, which if it had been proved, the verdict ought to have been for plaintiff. *R. Ca. Ch. 65.*

That the trial was not in an indifferent county. *2 Ver. 437.*

So, if a trial be upon a point directed by the court, which was not directly in issue, there shall not be a new trial for that cause. *2 Ca. Ch. 41.*

[The court will not direct a new trial after a verdict found for a *modus*, because the judge would not admit as evidence an old deed in the chapter-house at *Westminster*, said to be the record of a cause determined

determined before the pope's delegate. *Colegate v. Juson*, M. 1744, 3 Atkyns, 197.]

Or, if a trial was, whether a conveyance was fraudulent against *A.*, who claimed by articles, and by order was to be admitted a purchaser; tho' a settlement pursuant to the articles was not ordered to be admitted, without which *A.* could not be a purchaser by law. *Ca. Ch.* 217.

[New trial refused after two verdicts against deeds, and a will for fraud. *Bates v. Graves*, 2 Ves. jun. 287.]

[So, also, on the ground of farther evidence to be produced, there having been no fraud, or surprize, but the evidence kept back by the party applying, altho' the Lord Chancellor were much dissatisfied with the verdict. *Standen v. Edwards*, 1 Ves. jun. 133.]

(4 W) Trust.

(4 W 1.) The Nature of it.

Chancery only will compel the performance of a trust.

A trust is a mere confidence, collateral to the land, and distinct from it.

To which there are two incidents inseparable; viz. privity in estate, and confidence in the person. *Hard.* 469. 488.

An use at common law was a trust, and executed only by the Chancery.

So, now, all uses which are not executed by the *st.* 27 H. 8. 10.

A trust may be assigned, or transferred by grant, &c.

There shall be *possessio fratris* of a trust. *Hard.* 488. 491.

Cestuy que trust shall be impanelled upon a jury.

So, a trust shall be forfeited. *Vide Forfeiture*, (B 1, 2.)—*Utilagary*, (D 2.)

[If *A.*, being in possession of office of clerk of the crown in *B. R.*, procures *B.*, who has also a life in it, to surrender, and solicits a patent for himself and *C.*, and takes a note from *C.*, promising to declare a trust for *A.*, and the patent is afterwards obtained, and *A.* dies without calling for a declaration of trust, and refusing to have any thing concerning it inserted in his will, of which he makes *C.* one of the executors, yet the note shall be a sufficient declaration of trust. *Per Talbot C.*, reversing a decree of *Jekyll M. R.* *Bellamy v. Burrow*, T. 9 G. 2. C. T. 97.]

[Money in the hands of a trustee cannot be affected by a legal execution. *Caillaud v. Estwick*, 2 Anstr. 381.]

[Where it is necessary to resort to equity to raise an interest by way of trust, there must be a valuable, or at least a meritorious consideration. 1 Ves. jun. 55.]

[Trusts are a mode of conveyance peculiar to *England*. In all other countries the person entitled has the right and possession in himself; but in *England* estates are vested in trustees, on whose death it becomes difficult to find out their representatives, and the owner cannot get a complete title. 1 Term Rep. 759. in the case of *Brissonne v. Pegge*, in notis. See 1 Term Rep. 622, 623.]

(4 W 2.) Trust of Land; what shall be.

(4 W 2.) *Express.*] If a man articles with another for the sale of land, the vendor stands seised in trust for the purchaser. *Vide ante*, (4 I 1.)

So, a devise to *A.* to be given to his children, as he shall think convenient, solely trusting to his honour and discretion to give what will be necessary for them, shall be a trust for his children. *Mod. Ca.* 111.

So, if the devise be to dispose and employ upon himself and his son, it shall be a trust to dispose to his son, and not to a stranger. *Per two J. Mo.* 57. *Dal.* 58.

Or, to dispose of at his pleasure, and give to one of his sons. *R. Jon.* 137. *Latch*, 9. 39.

If a man devise to his executor, during the minority of his heir, for payment of portions and legacies, and to be accountable to the heir for the surplus; it shall be a trust as to the surplus for the heir. *1 Ch. R.* 251.

So, if land be devised to the heir, on condition to be sold; tho' the condition be void, yet it shall be a trust in the heir to sell. *Ca. Ch.* 177.

If a devise be to *A.* and *B.* in trust for a *feme-covert* and her heirs, and that *A.* and *B.* dispose of the rents and also of the inheritance as she shall appoint; this shall be a trust, and not an use executed by the *st.* 27 *H.* 8. 10. *1 Ver.* 415.

[If *A.* devises to trustees and their heirs, on trust by rents or sale to pay debts, and then to *B.* for life, without waste, to trustees, to support, &c. to the heirs of his body, to *A.*'s right heirs; this is a trust in equity, and not an use executed by the statute. *Bagshaw v. Spencer*, *M.* 1748, *1 Ves.* 142.]

If *A.* purchases a copyhold for himself, his wife, and daughter; it shall be a trust for them, and the husband cannot surrender. *R. Pr. Ch.* 1.

So, if a conveyance be void, being upon a trust, it shall be supported in equity: as, if tenant *pur auter vie* conveys to *A.* and *B.* and their heirs, *habend.* for years, upon trust for payment of debts. *Ca. Ch.* 249.

If a bargain and sale be to *A.* and his heirs, to the use of *B.* &c. tho' there cannot be an use upon an use, yet it shall be a trust for *B.* *Dub. Ca. Ch.* 115.

If *A.* devises tithes to all who serve the cure in the parish; it shall be a trust for them. *2 Vent.* 349.

Trust in tail, how barred, *vide ante*, (4 S 4.)

(4 W 3.) *Implied.*] So, if a testator devises to *A.*, who confesses that the testator said, that he might do so and so to his heir, and explains, that by those words the testator intended that he should pay him 40 *l.* if he behaved well; it shall be a trust to pay it. *R.* *2 Ver.* 559.

So, if a mortgage be assigned to *A.*, without any trust declared, and *A.* confesses that the trust was for *B.*, it shall be in trust for him, and not result to *A.* *2 Ver.* 294.

If money be delivered to *A.*, and at the time the deliverer says, *I give you this to be a father to my child, paying her the interest during her life*,

life, and after to her children, and if she have none, the principal and interest to your wife; and after the death of the donor, *A.* makes a writing, declaring the trust to the same effect; it shall be a good declaration of the trust since the *st. 29 Car. 2. 3. R. in the Exch. Mich. 6 Geo. 2.*

So, if *A.* articles for a purchase, and to pay the purchase money, but the conveyance is made to *B.*, who borrows and pays the purchase money, and gives a mortgage for it, but afterwards the mortgage is discharged by *C.*, and then *A.* agrees to indemnify him, and afterwards *B.* devises this land for payment of debts; it shall be a trust for *A.*, tho' the creditors of *B.* are thereby defeated, and there was no express declaration of the trust for *A.* *R. 2 Ver. 167.*

If a rent-charge or annuity is granted out of the estate of *B.* to *A.* to be paid in the first place, and *A.* never demands it for 40 years; it shall be presumed to be in trust for *B.* *2 Ch. R. 220.*

If a debtor to the king purchases in the name of his son, and enjoys during his life; it shall be a trust for the father. *R. Hard. 126.*

[If testator give to trustees for terms, remainder to *A.* and *B.* for life, the trustees of the terms being to pay scheduled debts of *A.* and *B.*, and to make them an allowance, after payment of the debts; the trusts result to *A.* and *B.* *2 Brown, 203.*]

So, if a man purchases lands in the name of another, the other shall be a trustee for the purchaser.

[If a man purchases lands in the name of another, it is a resulting trust. *Lade v. Lade, T. 16 G. 2. Wils. 21.*]

[Tho' there is no express trust in a deed, yet if it can be collected from circumstances arising out of the assignment itself, the court will permit parol evidence to explain it; for tho' there can be no parol declaration of a trust, yet parol evidence may be admitted in avoidance of a fraud. *Hutchins v. Lee, H. 1737, 1 Atkyns, 447.*]

[He who pays the purchase money, clearly proving it, has a resulting trust; or if it can be shewn by parol evidence that the pretended owner was in such circumstances that it was impossible he should be the purchaser. *Willis v. Willis, M. 1740, 2 Atkyns, 71.*]

And that since the *st. 29 Car. 2. 3. R. 2 Vent. 361. R. in Scacc. Mich. 4 Ann. inter Freeman and Allen. Semb. 1 Ver. 366, 7.*

Tho' the purchase be in the name of his son, if he was before advanced by his father. *R. 2 Ca. Ch. 232.*

[A father advances his son in marriage, has other children unprovided, sells an estate, receives part, takes security for the rest in his own and son's name, receives interest and part of principal, without son's opposing, dies, executor receives interest, the son writing receipts for it; the son is a trustee for the father. *Pole v. Pole, H. 1747, 1 Ves. 76.*]

So, if money is lent by *A.*, and a bond taken in the name of his son, an infant, to whom *A.* devised the moiety of his estate; the bond shall be taken as his personal estate. *1 Ch. R. 86.*

If the trustee of a college lease renews the term in his own name, this shall be for the benefit of the *cestuy que trust.* *Ca. Ch. 191. Mod. Ca. 67. 1 Ver. 276. 484.*

[*A.*,

[*A.*, the last life in a bishop's lease, agrees with *B.* to surrender it, to take another for the lives of *A.*, *B.*, and *C.*, *B.*'s son, to be in trust for *C.*; the consideration is all paid by *B.*, the lease made to *A.* and his heirs, and *A.* one day after executes a deed-poll, declaring the trust to be after his death to *B.*, *C.*, and their heirs; here is no resulting trust for *B.*, but after *A.*'s death *B.* shall have it for life, and then *C.* *Crop v. Norton*, *M.* 1740, 2 *Atkyns*, 74.]

So, if an executor in trust renews a lease with his own money, it shall be for the benefit of the *cestuy que trust*, subject to the payment of the fine and charges upon the renewal. *Ca. Ch.* 191.

[If tenant for life of a leasehold estate under a settlement renew the lease, or get an additional term in his own name, it shall be a trust for the uses of the settlement. *Ambler*, 668. 715.]

If *A.* takes a mortgage in the name of *B.*, and by *parol* says, *that he intends B. shall have it*; if it be not paid in his life, but afterwards by his will he devises another estate to *B.*, and the residue of his estate to his executor, the mortgage shall be in trust for the executor. *R. 1 Ch. R.* 216.

[The court would consider the next remainder-man as trustee for a posthumous son, for the intermediate rents of settled lands between the father's death and his birth, as they would trustees to preserve contingent remainders over; even supposing that by law he had not a right to such rents. *Basset v. Basset*, *M.* 1744, 3 *Atkyns*, 203.]

[Where one devised his estate to be sold, and gave the residue of money to arise by sale to several uses, *inter alia*, part to a charity, which was void, and made a residuary legatee; the charity legacies were decreed to the heir. *Ambler*, 643.]

[So, where testator gave several legacies, and ordered his *real* and personal estate to be sold, his debts and legacies paid, and the residue to certain legatees, in the proportion of their legacies; two of the residuary legatees died while the testator was alive, their shares are lapsed, and so far as they arise from the personal estate, shall go to the next of kin, and so far as they arise from the produce of the real estate, shall go to the heir at law. 1 *Brown*, 503.]

But by the *st.* 29 *Car.* 2. 3. all declarations, or creations of trust, shall be manifested by some writing signed by the party enabled to declare such trust, or by his will, or else shall be void; provided, where a conveyance shall be made of land, by which a trust may arise or result by implication, or construction of law, or be transferred, or extinguished by act, or operation of law, such trust shall be of like effect as if the said act had not been made.

And by the *st.* 4 *Ann.* 16. a declaration of uses by deed after a fine or recovery, shall be as good as if this act had not been made.

And therefore, a lease for years to *A.* shall not be averred to be in trust for him and *B.* *Semb.* 1 *Ver.* 108.

Yet, if a son prevails on his mother, made executrix by the will of his father, to get a new will executed, and himself to be made executor, and he acts for his mother; it shall be a trust for the mother, tho' there be no writing. *R.* 1 *Ver.* 296.

If *A.* devises to *B.* and *C.* 1500*l.* upon secret trust to them declared, and *B.* by letter to *C.* mentions the trusts; it shall be a sufficient declaration. *R.* 2 *Ver.* 107.

If a man devises to his nephew, and afterwards purchases land, and

and says to his heir, *that he will have his nephew take it*; tho' he has not declared it by writing, and the heir permits it for eleven years, it shall be a good execution of the trust. *R. Eq. R. 11.*

[A testator having said in his will, "in consideration that my wife has promised to give what I shall give her to her, and her children at her death, I give her, &c." This was held a trust for her children after her death. *Ambler, 519.*]

[So, if a man devise to his wife, *not doubting* she will dispose of the same amongst my children; this is a trust for the children, as she shall appoint. *Id. 20.*]

[Where the trustees named by the deviser cannot take, as in the case of an estate devised in trust to a body corporate, which by the statute of mortmain cannot take, the user shall not be defeated by this incapacity of the trustees, but shall attach on the estate which the law raises, and the heir at law shall be a trustee to the uses of the will. *1 Brown, 81.*]

[Trust raised by implication from letters, and a paper referred to by them, and in the hand-writing of the party, tho' not signed or dated, and by operation of law from advances of money. *Forster v. Hale, at the Rolls, 3 Ves. jun. 696.*]

[The *stat.* of frauds requires not that a trust shall be created by writing; but that it shall be proved by writing, which may be subsequent to its commencement. *Ibid.*]

[When letters are to raise a trust, there must be demonstration that they relate to the subject. *Ibid.*]

What shall be a trust for payment of debts or legacies, *vide ante*, (3 A 3.)—*Post.* (4 W 14.)

What, for making a charge upon land, *vide Appointment, ante*, (2 F 1.)

What for charitable uses, *vide ante*, (2 N 1, &c.)

What shall be a trust for a wife, *vide ante*, (2 M 9, 10.)

(4 W 4.) What not.

But if a father sells his ancient estate, which would have descended to his son, and with the money purchases other land, and the conveyance is made to him and his eldest son, and their heirs, without any trust expressed: this shall not be construed to be a trust for the father, but an advancement for the son, who shall hold by survivorship against the devisee of the father. *R. 15 Car. 2. Ca. Ch. 28.*

So, if a father purchases in the name of his son and heir apparent, (who has no other estate,) and afterwards manages the land as his own, and sometimes it is said to be the land of the father, sometimes of the son, but the son devises it to the father, who proves the will; this is not a trust, but an advancement to the son. *R. Ca. Ch. 296. 3 Ch. R. 9.*

So, if he purchases in the name of his son, not advanced, and afterwards takes the profits, and makes leases, without any trust expressed before or at the time of the purchase. *2 Ca. Ch. 231.*

So, if the father, lord of a manor, grants a copyhold to his son, tho' the father afterwards takes the profits, always with the consent of the son, it shall not be a trust for the father. *R. Ca. Ch. 261.*

1 Ver. 467.

VOL. II.

Or, purchases a copyhold in the name of his son, who is admitted. *R. Ca. Ch.* 310. *R. 2 Ver.* 19.

So, if a father purchases in the name of his son and heir, without declaring a trust before or at the time of the purchase, tho' afterwards he declares a trust for himself. *2 Ca. Ch.* 231.

Tho' he takes a declaration of trust from the son, when sick, if the son afterwards continues the possession; for the declaration was a fraud. *R. 2 Ver.* 436.

So, if the grandfather, after the death of the father, takes a bond in the name of his grandson, an infant; it shall not be a trust for the grandfather, but a provision for the grandson; for he was then under the immediate care of the grandfather. *2 Ca. Ch.* 26.

So, if he makes a lease to the grandson. *Ibid.*

So, if a father by lease and release settles an estate to the use of himself for life, then to his wife for life, then to his son in fee; the remainder to the son shall not be a trust for the father, tho' the father on the same day devised the estate by his will, subject to the payment of his debts. *R. 2 Ver.* 28.

If *A.* purchases a copyhold, and takes a surrender to himself, his wife, and daughter, and afterwards mortgages; the mortgagee shall have no relief against the wife, or daughter; for the wife takes with her husband a moiety by entireties, and the daughter the other moiety. *Ibid.* 120.

So, if *A.* takes a copyhold to himself, his wife, and *B. successive*; *B.* shall not be a trustee for *A.* without a custom that *A.* shall dispose of it. *Ibid.* 252. 264.

[Resulting trusts of copyholds as well as of freeholds, are within the statute of frauds, and therefore *C. Price*, who was the last life in an old copyhold in a manor in which the custom was to grant copyholds for three lives successively, as named, having renewed, by the advice of the lord of the manor, on the lives of two young persons who were strangers to him, the fine, which was 120*l.* being paid by *Price*; it was decreed, that the representatives of *Price*, and not the two young persons, were entitled to the copyhold. *Ambler*, 151.]

If a conveyance be to an use, it shall not be averred to be upon a secret trust, if the trust be not expressed. *R. 4 Inst.* 86.

If a settlement be in confirmation of a will, whereby the land becomes subject to the legacies given by the will, it shall not be a general trust for the testator. *R. 3 Ca. Ch.* 65. 127.

If a trust be expressed by a deed, proof shall not be allowed to shew a different trust. *1 Ch. R.* 110.

If money, found after the death of an intestate, who leaves a wife and two daughters, be by the wife vested in a purchase of lands, settled to the use of herself for life, and afterwards to the two daughters in tail, remainder to the heirs of the wife; if the daughters die without issue, the executor or administrator of the survivor shall not have a decree for two-thirds of the money, tho' he would have had it if it had not been vested in a purchase; for money shall not be followed after it is vested in a purchase. *R. 2 Ver.* 440.

So, if *A.* borrows money to discharge the estate of an infant, the estate of the infant shall not be charged with it. *R. 2 Ver.* 480.

If *A.* enjoys a term for 27 years, and by his will declares that the

term was taken by him in trust for *B.*, who is a papist, and therefore devises the remainder to him: the protestant next of kin shall not have an account of the profits in the life of *A.*; for a trust shall not be intended without other proof. *R. Eq. Ca.* 146.

So, if a man devises land to his wife, *in hope she will leave it to his son*; this shall not be a trust for the son. *Ch. Ca.* 310. [*Vide ante*, (4 W 3.)]

If he devises money to *A.* for such uses as he shall direct by note, and makes no note; it shall not be a trust for the executor or legatees. *R. Ca. Ch.* 198.

If he devises his personal estate to his wife, *not doubting she will be kind to his children*; it shall not be a trust for them. *R. Eq. Ca.* 122.

[If he devise his undivided moiety of sugar houses and stock in trade to his son *E. C.*, nevertheless, if his son *E. C.* shall depart this life without a son or sons, then if he recommend it to *E. C.* to give the sugar houses and stock to his other son; if *E. C.* die without having a son, but leaving a daughter, this is not a trust for the other son, but a mere recommendation. *Ambler*, 686.]

[Trust raised on a recommendation by will to a legatee to dispose of her legacy among certain persons after her death. *Malim v. Keighley*, 2 *Ves. jun.* 333. Affirmed by Lord Chancellor, on appeal from *Rolls.* *Ibid.* 529.]

[The case in *Ambler* over-ruled. *Ibid.* 335.]

[Testator by shewing his desire creates a trust; unless there be plain words, or necessary implication, that there is to be a discretion to defeat it. *Ibid.* See *Devise*, (F 2.)—*Supra*, (3 Y 7.)]

[Words of restraint, unless there be a provision for the consequence of violation, operate as a mere recommendation. 1 *Ves. jun.* 483.]

If *A.* by his answer denies the trust of a settlement, a bill brought by the executors or legatees of *A.* afterwards, for an execution of the trust, shall be dismissed. 1 *Ch. R.* 270.

But if the defendant by his answer confesses a trust, after such a sum paid; it shall be decreed, tho' it be not proved, nor charged by the bill. *R. 2 Ver.* 288.

(4 W 5.) Trust of Goods; what shall be.

So, if a man gives goods or chattels to another, upon trust, to deliver them to a stranger, *Chancery* will oblige him to do it.

So, if a wife lends money to another, and the note for it expresses that it shall be disposed of at her pleasure; it is a trust, and shall be decreed accordingly. *R. 2 Vent.* 345.

If a wife saves money out of her separate maintenance, and puts it to interest, without the assent of her husband, upon bond in the name of *B.* in trust for her niece; the money shall be in trust for her, tho' the husband was not privy. 1 *Ch. R.* 126.

[Twenty thousand pounds being devised in trust for poor relations who should claim within two years; one claimed, and the claim being allowed, and a sum of money ordered, she died before it was paid; the sum allowed was ordered to be paid to her executor. *Ambler*, 708.]

[So, another having claimed, but dying before any part of the legacy

gacy was ordered to be applied, it was ordered that her executor should be paid what the trustees should think proper, they having a discretionary power of distribution by the will. *Ambler*, 711.]

[When legacies were given to charities, with directions that the qualifications of the persons and the charities should be at the discretion and choice of his executors, this was held to be a trust, and not merely a naked power, and that it went to the surviving executor. *Id.* 584.]

[But, where several legacies and annuities were given, payable out of testator's estate, and the *residue* to be disposed of in charity, to such persons, and in such manner as the executors or the survivors of them should think fit, and four executors were appointed; two being dead, and another very infirm, a bill was brought to have other trustees added.]

[It was referred to the master to appoint additional trustees to sustain the annuities, but held that the new trustees could not dispose of the residue in charity, the power being confined personally to the executor. *Id.* 309.]

[If a solicitor makes an absolute conveyance from a woman parted from her husband, and having a child, of 1000 *l.* (all she has) to himself for services done, and favours shewn, and she says afterwards she has given it him, but he will take care of her daughter, then, that she has given all to her daughter; and the solicitor denies he has any deed when the husband pays his bill, (in which is a charge for perusing the draft of it,) and says in a letter to the husband, that the wife having a confidence in his honour towards the child, and being sensible of services done, &c. did execute, &c.; it shall stand as a security for any sums still due to him, and as to the surplus as a trust for the child, or if dead, for the father her representative. *Saunders v. Glas*, P. 1742, 2 *Atkyns*, 296.]

So, if a man devises goods and chattels to *A.* for life, and afterwards to *B.*, this shall be a trust for *B.* *R.* where the chattels were rarities, which he intended should go as heir-looms, and were devised to the use of *A.* for his life. *Ca. Ch.* 130. 1 *Ch. R.* 110. *R.* 2 *Ver.* 245. 331. *Vide ante*, (4 G 1.)

If a man gives his personal estate to *A.* in his lifetime, and afterwards directs him to take care of his funeral, and to pay two legacies to his nephew; *A.* has it only as a trustee. *R. Eq. Ca.* 115.

If a man devises his personal estate to the son, with which his wife is *enfeint*, and if such son dies before 21 or marriage, to his brother; if the son dies, the brother shall have it. 1 *P. W.* 502.

If a man levies more than he ought for his debt, he stands a trustee for the surplus to the debtor. *Semb.* 2 *Ca. Ch.* 184.

So, if a bond be given to *A.* as a trustee for *B.*, and *A.* by practice induces *B.* to answer upon oath in *Chancery*, that it was for the use of *A.* and not in trust; yet upon proof of the fraud the trust shall be decreed. *R. Ca. Ch.* 134.

So, if *A.* by a former answer acknowledged a bond to be satisfied with intent to avoid a sequestration; yet in equity he shall be relieved. *R. Ca. Ch.* 154.

If *A.* to whom a bond is given in trust for *B.* becomes *solo de fe*, *B.* shall be relieved by the *st.* 33 *H.* 8. 39. *Hard.* 176. *Vide Ufer* (F).

[If

[If *A.* by will leaves a bond to *B.* and by a subsequent will leaves it to *C.* on a promise that *C.* will at her death leave it to *B.*; and after *A.*'s death *C.* makes a deed of gift of it to *B.* to take place at her death, and declares she would not cheat *B.*, and that she did it in regard to her promise, and then dies, and makes *D.* (the obligor) her executor; the court will decree *D.* to pay the bond to *B.* *Drakeford v. Wilks*, T. 1747, 3 *Atkyns*, 539.]

A trust of a personal estate may be averred by *parol*. 1 *Ver.* 31.

If a man has only an equity in land, it may by *parol* be subjected to the payment of debts. 1 *Ver.* 45.

[Testator gave the residue of his personal estate to his wife, desiring her to provide for his daughter *A.* out of the same, as long as she, his wife, should live; and at her decease, to dispose of what should be left among his children in such manner as she should judge most proper; held by M. R. not to be an absolute trust for the children after the death of the wife. *Pushman v. Filliter*, 3 *Ves. jun.* 7.]

(4 W 6.) Assignment of a Trust.

So, a trustee, with the assent of his *cestuy que trust*, or by the direction of the court, may assign his trust to others.

Or, may release to his co-trustees.

And shall be decreed so to do, if he refuses the trust. *Ch. R.* 258.

So, if a devise be to several trustees, and when they are reduced to three, that they shall assign to others; the court will oblige them, when reduced, to assign to others.

And if they do it not till all, except one, are dead, the survivor alone may assign to others, and the trust shall not result to the grantor, for want of an assignment. *R.* 2 *Ver.* 749.

But if a trustee assigns without the consent of the *cestuy que trust*, or of the court, to one who becomes insolvent, he shall answer for his default. *R. Bridg.* 38.

So, if a trust devolves to the heir, he may transfer it, or accept it upon terms, *viz.* that he shall be reimbursed his charges out of the trust estate, and shall not answer for more than he receives, nor for the loss of money put out at interest pursuant to the will, and shall account yearly. *Ch. R.* 32. 258.

If an administrator assigns a term, in trust for himself, and the administration is afterwards revoked, upon a citation or appeal; the assignment shall be avoided by a decree in *Chancery* at the suit of the new administrator. 2 *Ca. Ch.* 129.

[In a bill against a trustee, who has assigned his trust, the assignee must be a party, as the decree must be first against him, and the original trustee to stand as a security. 2 *Brown*, 225.]

(4 W 7.) Removal of a Trustee.

So, a trustee may be removed from the trust, if the others will not join with him, tho' he does not consent to it. *R.* 2 *Ca. Ch.* 131.

[Testator directed a new trustee to be appointed, if either should die, or become incapable of acting; one absconded on a charge of forgery,

forgery, but was not outlawed. Reference to the master to appoint a new trustee. *Millard v. Eyre*, 2 *Ves. jun.* 94.]

[Surviving trustee of stock appearing not to be indifferent, future dividends ordered to be paid into court. 2 *Ves. jun.* 199. 4 *Bro. C. C.* 339. *S. C.*]

(4 W 8.) Security required of him.

So, a trustee shall be bound to perform his trust.

If goods are devised to *A.* for his life, and afterwards to *B.*, *A.* being a trustee, shall be obliged to give security to deliver them to *B.* 1 *Ch. R.* 110.

(4 W 9) Trust; how it shall be executed.

(4 W 9.) *Pursuant to the intent.*] If a man devises an estate to his wife, to be distributed during her widowhood amongst his daughters by a former wife, and she marries, and afterwards distributes most to one daughter, it is not good; for a trust ought to be precisely pursued according to the intent of the maker, and therefore the distribution must be before her second marriage. *Ca. Ch.* 310. *Vide post.* (4 W 13.)

[Where a trust fund was created by will, to be laid out on lands, it was decreed that no part of it should be laid out in repairs and improvements of the purchased estate. 2 *Brown*, 653.]

If land be devised in trust for *A.* and *B.* rateably, and that it shall be conveyed to them *in like sort*, it shall be conveyed to them in common. *R.* 1 *Lev.* 232.

If a trust be to pay 200 *l.* to two of the daughters of *B.* born or to be born; *A.* then born shall have 100 *l.*, tho' *B.* has two daughters afterwards born. *R.* 1 *Ch. R.* 189.

If a man devises 1500 *l.* in trust for *A.* for life, and if she survives her husband to be disposed of to *A.*, but if her husband survives, to go among the children of *B.* as *A.* directs: *A.* makes no direction, but survives; *B.* had five children at the time of the devise, but four die having issue; the whole 1500 *l.* goes to the child who survives, for grandchildren cannot take by a devise to children, if any child is living; otherwise if all the children are dead. *R. cont. per Jefferies*, but *per Commissioners acc.* 2 *Ver.* 108.

If a devise be of 300 *l.* a-piece to two daughters, and to the third daughter as much as his executor pleases; she shall have 300 *l.*

[When there is a general trust of money for a society, a particular member cannot set off his private debt against the share he may be entitled to on a contingency. *Lee v. Carter*, *M.* 1740, 2 *Atkyns*, 84.]

[Where a term is created to raise by rents and profits, trustees may raise by sale or mortgage. 1 *Ves. jun.* 234.]

[At common law a trust estate shall not be set up in ejectment, to defeat the *cestuy que trust*. *Douglas*, 721. in the case of *Doe v. Pott*. And a trustee shall not be permitted to bring an ejectment against the *cestuy que trust*. 1 *Term Rep.* 737. *Goodtitle v. Way*, 4 *Term Rep.* 683.]

[In the case of a plain trust, where the trustees were directed to convey

convey to a devisee on his attaining 21; the jury may be directed to presume a conveyance at any time afterwards, tho' considerably less than 20 years; it is what they are bound to do, and what a court of equity will compel them to do, if they had refused. 4 Term Rep. 682, 683. *England v. Slade.*]

(4 W 10.) *When money shall be decreed in specie.*] If a man devises money to be vested in land, to be settled to *A.* for life, and afterwards to *B.* in tail, and afterwards to *C.* in tail; if *A.* dies and *B.* is under age, the money shall not be decreed to *B.* *Vide post.*

(4 W 16.)

So, if *B.* be of full age, tho' he might by recovery bar him in remainder; for perhaps he will not suffer a recovery, or may die before he does. *R. cont. but per Cowper acc.* 2 Ver. 552.

[If money is articted to be laid out in land, to be settled on *A.* for life, remainder to his first, &c. sons, remainder to his right heirs, and *A.* dies, leaving an only son; the court will not order him the money on petition. *Per King C. Eyre's Case, T. 1726, and Onslow's Case, H. 1732. Cont. per Parker C. Short v. Wood, and many other cases.* 3 P. W. 13.]

So, a conveyance shall be decreed to *cestuy que trust* in tail only for an estate tail, and not in fee. *R. 2 Ver. 428.*

[So, if money is to be vested in a purchase to the use of husband and wife and the survivor for life, and afterwards to the heirs of their bodies, and for default, to the heirs of the body of the wife, and afterwards to *B.* the brother of the wife and his heirs; the wife dies without issue, and then the husband dies before the purchase made; the money shall be decreed to *B.* who was also administrator *de bonis non*, &c. to the wife, and not to the administrator of the husband, tho' he survived. *Cont. per Trevor and Rawlinson; but Hutchins acc.* 2 Ver. 227.]

If *A.* devises 500 *l.* a-piece to his two daughters, to be laid out in a purchase and settled upon his daughters, and if either of them die before marriage, 150 *l.* or land to that value, to go to the survivor; one of them marries and survives; her husband shall have the whole given to his wife, and the survivorship; for it shall be regarded as money. *R. 2 Ver. 284.*

[If 3000 *l.* is vested in trustees, 2000 *l.* for the eldest son, and 1000 *l.* for the younger children, and there is a proviso in the article, that the 3000 *l.* shall be laid out in land, to be to the same uses, and subject to the same conditions as are declared concerning the money, and part of the 3000 *l.* is accordingly laid out; this shall be considered as money and not as land. *Combe v. Combe, T. 1741, 2 Atkyns, 185.*]

So, if money be agreed to be vested in a purchase to such and such uses; every party shall be decreed to have a like interest in the money as he would have had in the land, if it was purchased. 2 Ch. R. 409.

But where money is decreed to one who would be tenant in tail of the land when purchased, it shall not, after ten years are elapsed, be restored him in remainder. 2 Ver. 552.

If money be devised for a purchase, to be settled on a daughter in tail, her husband shall have the benefit for his life, tho' the wife died

died without issue before the purchase made, if there was issue born; for the husband would be entitled to be tenant by the curtesy. *R. 2 Ver. 536.*

So, if money be devised for a purchase to be settled upon *A.* for life, afterwards to trustees for his life, afterwards to the heirs of the body of *A.* remainder to others; it shall be decreed to be settled on the first and other sons of *A.* *Per King, 5 Geo. 2. 33, 34.*

[If by marriage articles money is to be laid out in lands to husband for life, trustees to preserve, &c. wife for life, their children, as they or survivor shall appoint, in default, equally, if but one, to that and the heirs of the body, in default, to husband in fee; and they have issue only one daughter, who marries *A.* and the money is paid to them, she not being *sui juris*, nor separately examined, and she dies; the money shall notwithstanding be considered as land, and the sister of the half-blood shall claim it under her father. *Cunningham v. Moody, M. 1748, 2 Vef. 174.*]

[Personal property under marriage articles to be invested in land, or government, or other securities; the court finding it in its original state, considers it as personal; but part having been laid out in land, which was settled, and afterwards sold, and the produce invested in stock till a proper purchase of land could be found to be settled to the same uses, that was considered as land. *Bristow v. Warde, 2 Vef. jun. 336.*]

[Personalty to be laid out in land, but lent on mortgage, considered as land, having been always out in trustees, and the uses never united with the possession, and held to pass by such general words in a will as will pass land. *Rashley v. Masters, 1 Vef. jun. 201. 3 Bro. Ch. Ca. 99. S. C.*]

[Where money in court was decreed to be laid out in land, petition that it should be paid to the person first entitled to an estate tail in it, with the ultimate remainder in fee, refused, till proof that there were no intermediate remainders in existence. *Hardcastle v. Skafis, 1 Anstr. 67.*]

So, a trust of land shall be decreed pursuant to the nature of the land; as, if land be of the nature of *Gavelkind*, or *Borough English*, it shall be decreed to all, or to the youngest son. *Vide Uses, (D 2.)*

If a trust be of a copyhold, where by custom the eldest daughter takes the whole; it shall all be decreed to the eldest daughter. *R. 2 Rol. 780. l. 40.*

So, trusts are to be construed by the same rules as legal estates. *1 P. W. 143.*

How a trustee shall account for money, or the profits of the trust-estate, *vide ante, (2 A 1, &c.)*

How he ought to pay legacies or other money, *vide ante, (3 G 3, &c.)*

When a trustee may sell for performance of the trust, *vide ante, (3 A 6, 7.)*

(4 W 11.) *When at the discretion of the trustee.*] But where a trustee has power at his discretion, *Chancery* will not control his judgment; as, if a man devises his lands, goods, and chattels to *A.*, upon trust that he gives them to his children and grandchildren according to the demerits,

demerits, and he gives all to one; the others shall not be relieved; for the testator submitted the whole to his judgment. *R. Ca. Ch.* 309. 1 *Ver.* 356.

[If trustees having an absolute *discretionary* power will not act, the court cannot act for them, unless in case of a charity. *Semb. Gower v. Mainwaring, M. 1750, 2 Ves. 87.*]

[Otherwise, if a rule is laid down for their conduct. *Ibid.*]

If *A.* settles his lands to the use of such child or children, and in such proportion as he shall appoint by will, &c. If *A.* gives an annuity to the youngest son and portions to the daughters, it will be well, tho' he does not distribute the land itself among them. *Semb.* 2 *Ver.* 80.

If he gives 100*l.* to each of his children, and if one dies, his portion to go to one or more of the survivors as his executor thinks proper; the executor may give the whole to one. *R. 2 Ver.* 513.

But if a devise be to an executor of land to be sold for payment of debts, when the executor thinks proper; he cannot sell, if there are personal assets sufficient. *Ca. Ch.* 281.

Nor, more than is necessary; for their discretion ought to be regulated by equity. *Semb. Ca. Ch.* 281.

If a devise be to a wife, upon trust that she shall dispose of it only for the benefit of her children, she ought to make an equal distribution. *R. 1 Ver.* 67. 355. 414.

[If testator leaves his personal estate to be disposed of among his family, as this court shall think fit, it will do it according to the statute of distributions. *Gower v. Mainwaring, M. 1750, 2 Ves. 110.*]

[Yet, where testator has left his estate to trustees, to give the residue among his friends and relations, where they shall see most necessity, and as they shall think equitable, and the trustees refuse to act, the court will refer it to a master to see in what proportions it shall be distributed to the next of kin. *Ibid.*]

If a man devises to his wife, to be distributed between his daughters as she shall judge meet, having a daughter by his wife and another by a former *venter*, and the wife give 1000*l.* to her own daughter, and only 100*l.* to the other daughter; the latter shall be aided in equity. 1 *Ver.* 355. *R. Ch. R.* 355.

If land be devised to *A.* upon trust to sell the whole or part for payment of debts; if he pays debts to the value of the land, it is a performance of the trust, and *A.* himself becomes the purchaser. *R. Ca. Ch.* 199.

So, if he pays to the value of part with his own money, he shall be a purchaser *pro tanto*; for he had power to sell the whole or part. *Ca. Ch.* 199.

If a devise be of land to be settled upon such son of *B.* as the trustees shall think proper; the court will give a day to the trustees to make a nomination; otherwise the court will name which son they please. *Ch. R.* 56.

If 400*l.* be devised to executors, to be distributed among them and their brothers, according to their necessity, as the executors please; a double share shall be given to the heir, he having a smaller provision. *R. and aff. in Parl.* 2 *Ver.* 421.

If a lease be upon trust, that an indefeasible estate be settled to *A.* for life, and afterwards to his wife for life, with remainders over, and

and the land of a delinquent is settled in 1657, and accepted of by *A.* and proof made that this land was intended to be settled; the trust is performed, tho' after the restoration the land is evicted. *R. Ca. Ch.* 298.

And the acceptance by the husband also binds his wife. *Ca. Ch.* 298.

(4 W 12.) *When equity with a legal interest shall be preferred to mere equity.* If *A.* has an equal equity with *B.* and afterwards obtains the legal interest also, he shall be preferred in equity to *B.*; as, if a mortgage, statute, recognizance, or judgment be made by *C.* to *D.*, and afterwards *C.* makes a second mortgage to *B.*, and a subsequent mortgage to *A.* If *A.* afterwards purchases the prior mortgage, statute, recognizance, or judgment, he shall hold the estate, till he is satisfied his last mortgage, before *B.* can redeem him. *Vide ante*, (4 A 10.)

But if there be a collusion in *A.*, *B.* shall be preferred; as, if *A.* had notice of the prior incumbrance before the mortgage to him.

So, if an husband having a term for years, makes a mortgage thereof to *D.*, and afterwards in consideration of the cancelling a bond made for the benefit of his wife, by lease and release settles the lands upon the wife and her heirs, and she devises to *B.* (who also obtained a release thereof from her heir at law) in the lifetime of her husband, who afterwards, in consideration of a marriage settles the lands upon *A.* who obtains the prior mortgage, but denies notice; yet *B.* who took out administration to the wife shall be preferred. *R. Eq. Ca.* 144.

[Where the equitable and legal estates, equal and co-extensive, unite in the same person, the former merges; therefore, where the former descends *ex parte paternâ*, and the latter *ex parte maternâ*, on their union, the paternal heir at law has no equity. *Selby v. Allston*, 3 *Ves. jun.* 339.]

(4 W 13.) Trust; how it shall be decreed.

(4 W 13.) *According to the intent of the maker.* A trust shall be decreed as near to the intention of the maker as may be; and therefore, if it be agreed that land shall be settled upon the wife for her jointure, and afterwards to the issue of the wife; it shall be decreed to the husband for his life, and afterwards to the wife; &c. for a jointure imports an estate to the wife, after the death of her husband. *R. Ca. Ch.* 125. *Vide ante*, (4 W 9.)

If articles upon marriage are, that land shall be settled upon the heirs of the body of the husband by his wife; it shall be decreed that the settlement be to the husband for life, remainder to trustees to preserve, &c. remainder to the first and other sons in tail. *R. 2 Ver.* 13. 670. 702.

Otherwise, if there be a devise upon such trust; for the devisee shall take according to the words of the will. *Cont. per Cowper; but upon a re-hearing per Harcourt acc.* 2 *Ver.* 670. (*Vide* 1 *P. W.* 142.)

[If a man leaves money to be laid out in land to be settled under several limitations to different branches of his family, and there are no trustees to preserve contingent remainders, the court will order

such

such trustees to be inserted in the settlement. *Baskerville v. Baskerville*, H. 1741, 2 *Atkyns*, 279.]

[If by marriage settlement of *A.* and *B.* money is assigned to trustees, to be laid out in land with the consent of *A.* and *B.* or the survivor, to the use of *A.* and *B.* and the survivor for life, remainder to trustees, to preserve, &c. remainder to the first and other sons in tail male, remainder to the daughters in tail general, remainder to the survivor of *A.* and *B.* in fee; and there are several children, and on the marriage of the eldest son *C.* he covenants to convey this money (if he survives his father) to trustees, to purchase land for particular purposes; and *A.* by his will devises this money to *C.*, and requires him to give a discharge of all demands on his estate, which he does, and the money is paid to him with the consent of his brothers; this money is not liable to any entail, nor to be laid out in land, nor considered as a debt upon *C.*'s estate, but he shall have it as his absolute property. *Trafford v. Boehm*, H. 1746, 3 *Atkyns*, 440.]

[If a trust in equity is devised to *A.* for life, without waste, to trustees for *A.*'s life, to support, &c. and to the heirs of *A.*'s body, and then to testator's right heirs; this is a trust *executory*, as to the heirs of *A.*'s body, and these words shall be taken as words of purchase to fulfil testator's intention; and *A.* takes only an estate for life, with contingent remainders to his issue successively. *Bagshaw v. Spencer*, M. 1748, 1 *Ves.* 142. 1 *Wils.* 238.]

So, if a devise be to trustees for payment of debts, and that they settle the remainder on his son and the heirs of his body, but take care that he may not dock the entail during his life; it shall be decreed to the son for his life only, not in tail. *R.* 2 *Ver.* 526.

If a settlement be pursuant to articles, to the husband for life, to the wife for life, to the first and other sons of the marriage in tail, and afterwards to the sons of the husband by a second wife in tail, and then to the heirs of the body of the husband, where the articles were to the heirs female of the body of the husband; it shall be rectified by decree. 2 *P. W.* 349.

Tho' the articles were made in the year 1685, and the settlement afterwards in the same year, and there was an acquiescence for 40 years and a recovery suffered, and a devise made by the husband. *R.* *cont. per Excheq. but reversed*, 2 *P. W.* 349.

If after articles a settlement be made, with a provision of portions for the daughters of a former marriage, the settlement shall be good. 2 *P. W.* 540.

So, a trust shall be decreed according to the intention of the party, tho' the words import a different construction; as, if a man devises lands in trust for *K.* in tail, and if she dies without issue, to *B.* for life; and in another clause says, if *K.* dies without issue, and *B.* is then dead, *then and not otherwise to A. in fee.* *K.* dies without issue, *B.* survives her and dies; the land shall be decreed to *A.*, and not to the heir of the devisor; for his intent was, that *A.* should take, and the words (*then and not otherwise*) mean only that he shall not take till *B.* is dead. *R.* 2 *Vent.* 363.

[The court may decree trust-money in marriage articles, against the words, to fulfil the intent; thus, if it is agreed that 1250*l.* the wife's

wife's fortune, and 1250*l.* of the husband's, shall be settled in trustees, to permit husband to receive during their joint lives; if he dies first without children, the wife to have the 2500*l.* transferred to her, if he leaves children, she to have it for life only, if they die, her right to the whole to revive; if she dies before husband, she to dispose of 500*l.* as she shall appoint, in default, to her mother if alive, if not, to her sister, the rest to be at the husband's disposal; and she dies before her husband, leaving son and daughter, her sister (who had an equal fortune with her) shall not have it, but the court will supply the words (without issue), and it shall go to the son and daughter. *Targus v. Puget*, H. 1750, 2 *Ves.* 194.]

[If money is given in trust for the child of *A.* if he leaves any at his death, remainder to *B.* with power to trustees to apply the produce for maintenance and advancement, and *A.* is 60 and his wife 40, and have no child, the court will not order all the growing produce to be paid to *B.*, but may order some annual maintenance. *Kirby v. Clayton*, H. 1750, 2 *Ves.* 241.]

[If money devised in trust, to be laid out in lands in *England* for the benefit of *A.*, remainders over, is by act of parliament secured on *A.*'s estate in *Scotland* during his minority; *A.* comes of age, and becomes lunatic, it may be called in and laid out pursuant to the trust. *Marquis Annandale v. Marchioness Annandale*, T. 1751, 2 *Ves.* 381.]

If husband and wife settle the land of the wife, to them for life, and afterwards to their issue, remainder to the husband in fee, provided, that if the wife survives, (they not having issue,) she may revoke; the husband leaves issue, the wife survives, and the issue dies without issue in her lifetime; the wife may revoke. R. 2 *Ver.* 651.

So, a thing for the public good shall be liberally expounded; as, if by act of parliament the New-river water is to be brought to the *North* parts of the town; if it be brought to the *South* or *South-west*, it shall be within the benefit of the act. *Per Ld. Somers*, 2 *Ver.* 432.

If liberty be given to serve the city, they may serve the parts adjacent. 1 *Ver.* 432.

If they may dig *in alieno solo* a trench of 10 feet wide, pipes within the same compass may be laid. R. 2 *Ver.* 431, 2.

[If *A.* by will gives his real estate to his son, &c. failing which to trustees, for such charitable uses as he shall direct; and as to his personal, to the same trustees to pay legacies, to allow maintenance to his son, and to pay it to him at age or marriage; or, if he dies, to be disposed of among the widows and orphans of dissenters, and his poor relations, as trustees (whom he makes executors) think fit; and by codicil directs, that in case of his son's death, the lands shall be sold or not, as trustees please; and the purchase money or rents disposed of as he shall appoint, or, in default, as trustees please: he leaves no direction, son dies without issue; there is no resulting trust for the heir at law, nor beneficial interest given to the trustees, the real estate is subject to the same trust as the personal, whether sold or not; the trustees are considered as trustees throughout for both, and shall lay a scheme before the master for applying it to charitable uses,

uses, pursuant to testator's intention, having particular regard to his poor relations and their circumstances. *Cook v. Duckenfield*, P. 1743, and H. 1743, 2 *Atkyns*, 562. 567.]

[If by articles, previous to marriage of *A.* and *B.* money is to be laid out in purchase of lands, or renewable leases, to be settled, &c. the last limitation to *A.* and his heirs, and till purchase made, the trustees to put out the money and apply the produce to the same uses; and *A.* dies before any purchase is made, and by his will devises all his freehold, leasehold, and copyhold in *I.* and *E.* or elsewhere, to *B.* for life, and then to *C.* and his heirs, and gives his personal to *B.*, paying debts and legacies, and makes *B.* and *C.* executors; the money shall be laid out in lands or leaseholds. *Guidot v. Guidot*, T. 1745, 3 *Atkyns*, 254.]

[If a man conveys 1000 *l.* to trustees, to lay it out in lands within 22 miles of *C.* and the first tenant in tail suggesting no such purchase can be found, prays it may be laid out elsewhere; the court will order the trustee to look out for a purchase within the deed, and if in convenient time it cannot be found, will deviate from the strict terms of the trust. *Maynwaring v. Maynwaring*, H. 1746, 3 *Atkyns*, 413.]

[A trust must take effect according to the whole intent, or not at all; therefore, if money is directed to be laid out in land for a charity, and is void as to that, it shall not be laid out in land for a charity, and is void as to that, it shall not be laid out in land and descend to the heir. *Mogg v. Hodge*, M. 1750, 2 *Ves.* 52.]

[If *A.*, possessed of a term, conveys it to trustees to permit *B.* his wife to receive during the term, if she so long live, then to permit *A.* if he so long live, then for the heirs of the body of *B.* by *A.*, their executors, &c. and for default to *C.* if she so long live, and then to her two sons; *A.* dies, having never had issue; the whole term is not in *B.*, for if she so long live is the same as for life; the heirs of the body are words of purchase, not of limitation. *Hodgeson v. Bussay*, M. 1740, 2 *Atkyns*, 89.]

[Trustee having engaged the trust property in an adventure, afterwards renounced it for the trust, and declared it to be for himself, decreed to account, altho' no part of the trust money had been actually laid out. *Wilkinson v. Stafford*, 1 *Ves. jun.* 32.]

[Trust fund, which under a power in a marriage settlement had been lent, shall be decreed to be paid into court, the trustees representing it to be in danger. *Payne v. Collier*, 1 *Ves. jun.* 170.]

[Tenant for life subject to a trust term not let into possession before account, nor till the trust is executed, unless on paying into court a sum sufficient to answer it; or unless the best way of performing the trust appears to be by letting him into possession. *Blake v. Bunbury*, 1 *Ves. jun.* 194. 4 *Bro. C. C.* 21. S. C.]

[To entitle the widow of an officer in the *East India Company's* service to Lord *Clive's* bounty, the marriage must have taken place before such officer retired from the service. *M'Kenney v. East India Company*, 3 *Ves. jun.* 203.]

[Trust under a marriage settlement for the next of kin of the wife, subject to her appointment by her will with two witnesses: appointment in favour of the husband by an unattested will being void, the children held entitled, not the husband, who is not of kin to his wife,

wife, and whose claim to her personal property is not in that character under the statute, but *jure mariti*; and according to the plan of the settlement he was not intended. *Watt v. Watt*, 3 *Ves. jun.* 244.]

[In an executory trust to be effected by the court, it is sufficient if it can satisfy itself of the testator's intention to carry it into execution. *Browne v. De Lañ*, 4 *Bro. C. C.* 527.]

(4 W 14.) *Trust for payment of debts.*—[If a man devises his *freehold* estate to trustees, to be sold for payment of his debts, and after other legacies gives his personal estate to his nephew; yet the personal estate shall be first applied to the payment of his debts, if there are no negative words. *Ferages v. Robertson*, P. 1731, *Bunb.* 301. *Vide ante*, (3 A 6.—3 P 1, &c.)]

[The personal estate shall be first liable to debts and legacies, and testator cannot discharge it, as against creditors; but as between heir and executor he may give his real estate to trustees, or charge it in equity, or direct it to be sold for payment, &c.; but in either way there must be direct words, or manifest intention to discharge the personal estate, or it will be first liable. *Walker v. Jackson*, T. 1743, *per Lord Hardwicke*, *Bunb.* 302.]

If a trust be for payment of debts, it shall be decreed against the heir, tho' there be no covenant for payment, and no creditor be a party, nor any debt expressed particularly in the deed. *Ca. Ch.* 249. *Vide ante*, (3 A 6.)

But not against a purchaser. *Ca. Ch.* 249.

So, it shall be decreed, tho' the conveyance be defective in law. *R. Ca. Ch.* 249. *Vide ante*, (2 T 5.)

So, if *A.* marries, and it is agreed that the portion shall be laid out in the purchase of lands to be settled upon *A.* and his wife and the heirs of their bodies, remainder to the right heirs of *A.*, and a bond is given to *A.* for payment of the money, when a purchase shall be provided; *A.* and his wife die, and *A.* directs payment to his executor to discharge debts and legacies, he not having issue; the bond shall be decreed to the executor, not to the heir. *R. 1 Ch. R.* 31.

If land be conveyed to *A.* for payment of such and such debts, and other land be conveyed to him by the same person for other debts; the heir shall not have an account against *A.* for one trust only, but the account shall be taken of both together. *R. 1 Ver.* 29.

If a trust be for payment of debts, which are claimed within a year; a creditor shall not be excluded after the year, if there be not a decree for it, upon a bill against him, to compel him to come in for his debt, or renounce the benefit of the trust. *R. 1 Ver.* 260. 319.

If a trust be for payment of debts in a schedule; a purchaser ought to apply his money to the payment. *Ibid.* *Vide ante*, (4 I 6.)

If lands are settled for payment of the party's debts in a schedule for the term of 1000 years, and afterwards to him and his heirs; his personal estate shall go in aid of the real, for the benefit of the heir. *Ch. R.* 480. *Vide ante*, (3 A 3.)

If an act of parliament directs payment of mortgages in the first place; they shall be paid before a prior statute or recognizance, tho' there be a general saving. 2 *Ver.* 712.

If a devise be for payment of debts, and debts upon bond are in part satisfied out of the personal estate, the residue shall be paid out of the land devised. *Per Harcourt, 1 P. W. 228. Vide ante, (3 A 3.) (Vide 2 P. W. 416.)*

So, debts which the devisor contracted for necessaries during his infancy. *1 P. W. 558.*

Or, money borrowed in his infancy, to pay for mere necessaries, not for extravagancies. *Ibid. 559.*

So, debts which the wife of the devisor had contracted to pay for necessaries. *Ibid. 483.*

If lands in mortgage are devised to an infant in fee, subject to the incumbrances thereupon, and other lands are devised to *B.* for payment of debts; the latter shall be liable to the payment of the mortgage. *2 P. W. 386.*

[If one indebted by note, after the six years elapsed, makes his will, and charges his lands with payment of his debts, such will revives the debt. *Jones v. Stafford, M. 1730, 3 P. W. 79.*]

But a trust for payment of debts shall not be applied for any debt not due at the time, without an express provision. *R. 1 Ver. 29.*

Nor, for a debt arising by the party's misfeasance; as, an escape, breach of trust, &c. *1 Ver. 431, 2. Eq. Abr. 138.*

Nor, for a debt which was contracted *mala fide*. *1 Ver. 432.*

So, if by marriage articles, a man agrees to purchase 400*l. per annum*, to be settled on the husband for life, then on the wife for life, and afterwards to the heirs of their bodies, and if he dies before the purchase, that the wife shall have 3000*l.* or 400*l. per ann.* at her election; the husband dies before the purchase, having several children, the wife chooses the 3000*l.*, whereby there are no assets for creditors; she shall be compelled to take the 400*l. per ann.* *R. 2 Ver. 605.*

[If an estate is devised in trust to raise by rents, mortgage, or sale, enough to pay, &c. and subject thereto, to a daughter in strict settlement, remainder over; the estate is not sufficient, during the life of a jointress, to keep down the interest, and arrear accrues; afterwards it is more than sufficient; the surplus now shall be applied to pay the former arrear, but the daughter unprovided for shall first have a maintenance. *Revel v. Watkinson, T. 1748, 1 Ves. 93.*]

[Trustees to pay debts, may sell or mortgage without a decree. *E. Bath v. E. Bradford, T. 1754, 2 Ves. 587.*]

[But he cannot sell by private contract after a bill brought by creditors, and submitted to. *Ambler, 676.*]

[Devise of land to trustees to be sold, the money produced by the sale charged with simple contract debts, tho' the intention were doubtful. *Hidney v. Couffmaker. Per Lord Thurlow C. 1 Ves. jun. 436. Affirmed on re-hearing by Lord Loughborough C. 2 Ves. jun. 267. Affirmed on appeal in Dom. Proc. 1797.*]

[The expression "after paying debts," amounts to a charge for debts. *Ibid. 440.*]

[The leaning of the court to charge land with simple contract debts must be warranted by the intention. *Ibid. 443.*]

Where testator combines real with personal generally, the former is subject to all the burthens of the latter. *Ibid. 444.*

[Intent

[Intent may be argued from unnecessary words. 2 *Ves. jun.* 444.]

[Devisees in trust to sell for payment of debts assign to the son of the devisor; the creditors receive the interest from him for eleven years, under an agreement with him for an increase of the interest, the original trustees continue liable. *Hardwick v. Mynd*, 1 *Anstr.* 110.]

(4 *W* 15.) *A trust shall be decreed to him who would take if the settlement were completed.* If there be a trust, that money be laid out in a purchase of land to be settled to such and such uses, every one shall have the same benefit, if the parties die without a settlement, as he would have had if land had been settled. 2 *P. W.* 174.

As, if the land was to be settled upon a woman and the heirs of her body; if she marries, and has issue, and dies before any settlement, her husband shall be allowed to have the interest for his life; for he would have been tenant by the curtesy, if the settlement had been made. 2 *Ver.* 585.

So, if the trust of land be for a woman and the heirs of her body; her husband, if he has issue, shall be tenant by the curtesy. 2 *Ver.* 585. 681.

But if the settlement directed will make a perpetuity, the settlement shall not be decreed for such intent; but to all *in esse* it shall be only for life, and upon a limitation to such as are not *in esse* it shall be in tail. *Ibid.* 738.

(4 *W* 16.) *So, money for a purchase may be decreed in specie.*—[If a man brings a bill, to have money in specie devised to be laid out in lands to be settled on him in tail, remainder to another in fee; the remainder-man, tho' of age, must be a party, or he cannot have it. *Talbot v. Whitfield*, *M.* 1725, *Bunb.* 204. *Vide ante*, (4 *W* 10.)]

If 1000 *l.* be devised for the purchase of land for *A.*, *B.*, and *C.*, and their heirs, equally to be divided; each may pray his share in money if he be not an infant. *Per Cowper*, 1 *P. W.* 389.

[Where a testator directs personal property to be converted into real, such property shall be considered as real, and if any thing results, it shall go to the heir. *Arg.* 2 *Ves. jun.* 7.]

[Where testator desires all his money may be disposed of as land, or *vice versa*, that is a direct trust, and will be executed in equity. 2 *Ves. jun.* 170.]

[The intent of devisor is a consideration for devisees. *Ibid.*]

[Devise of land to *A.* in tail, with remainders over, and of money to trustees, to be laid out in land in the same manner. *A.* suffered a recovery of the land; the court will not direct the money to be paid to *A.* *Anon. Anstr.* 453.]

So, if there be a devise, that the land purchased shall be to husband and wife for life, afterwards to the heirs of their bodies, afterwards to the heirs of the husband; the son of their bodies may make his election to have the money, and it shall be decreed, tho' there are daughters, who might take as heirs, if there was no son, nor issue. *Per Trevor*, 1 *P. W.* 130.

So, if it is to be settled to a woman for life, to her first and other sons in tail; remainder to her heirs; she and her only son of full age may

may pray a decree for the money, one third to her, and two thirds to the son. *Per Parker*, 1 P. W. 470.

[If money is left by will to trustees, in trust for *A.* and her heirs, to be laid out in the purchase of lands; the money may be paid to her husband, *A.* consenting in court. *Pearson v. Brereton*, H. 1743, 3 Atkyns, 71. This is sometimes refused; therefore *qu.* Because if the wife were to die before the money could be invested the heir would be entitled.]

If 1000 *l.* is agreed to be vested in a purchase, to the use of *B.* in tail, remainder to him in fee, it shall be decreed to him; for he may bar all the limitations by a fine, which may be levied in vacation time. 1 P. W. 471. 2 P. W. 173.

But if money is to be laid out in a purchase for *A.* in tail, remainder to *B.* the money shall not be decreed to *A.*, for *A.* may die without issue, before recovery can be suffered. *Per Cowper*, and afterwards *per Parker*, 1 P. W. 470. *Cont. before* 1 P. W. 91.

So, if the limitations be to *A.* in tail, and he is an infant; for he cannot levy a fine during his minority. 1 P. W. 471. 91.

[4 W 17.] *Trust decreed notwithstanding the statute of limitations.* If money be delivered upon trust, the payment thereof shall be decreed, notwithstanding the statute of limitations. *R. where the statute was pleaded to a bill for relief.* 2 Vent. 345. *R. upon a plea*, Ca. Ch. 20. 1 Ch. R. 125.

So, where money is received by one as deputy to another. *R.* Ca. Ch. 20. 3 Ch. R. 8.

So, if *A.* files a *latitat* against his debtor, and continues it during his life, by which means the statute of limitations does not incur, he may exhibit a bill against the debtor's executor in equity, and the statute of limitations shall be no bar. 2 Ver. 695.

So, if an estate be vested in trustees for *A.*, an account shall be decreed for the profits, and is not barred by the statute. *Eq. Ca.*

33.

So, if a bill in equity be dismissed because the plaintiff has a remedy at law, and the statute of limitations is incurred *pendente lite*, Chancery will not suffer the defendant at law to plead the statute of limitations. 1 Ver. 73, 4.

But where a demand is not made in equity in a reasonable time equity does not relieve.

As, where a devise was of land for payment of debts, and afterwards to the executors, but if any one of the name of the devisor would purchase, he should have the estate for 200 *l.* under the value; a bill, brought by one of his name to have the purchase 25 years after his death, was dismissed. 1 Ver. 362, 3.

[4 W 18.] *Tho' the time to perform it be elapsed.*—So, payment of a legacy was presumed, above 40 years having elapsed without a demand. *Jones v. Tuberville*, 2 Ves. jun. 11.]

[Infancy of defendant no excuse for plaintiff's delay. *Ibid.*]

A trust for sale of lands shall be decreed, tho' the time for sale be elapsed. 1 Ch. R. 183.

So, if a devise be to *A.*, upon condition that he lays out within five years 7000 *l.* in the purchase of other lands to be settled to the

same intent; if the time for performance be elapsed, pending suits concerning the will, the time to perform may be enlarged. *Ch. R.* 55.

So, if after a contract for lands, an order be made for payment on such a day by consent, or the articles to be cancelled; the time for payment may be enlarged by the court. 2 *P. W.* 66.

A trust shall be executed against all, who claim by privity of estate, or with notice, or without consideration. *Per Hale, Hard.* 469.

So, against a tenant in dower; for the claims in the *per.* *Hard.* 469.

So, if a trustee commits treason, felony, &c. or is outlawed, &c. *cestuy que trust* ought to have a remedy against the king, who by the forfeiture, or escheat. *Cont. vide Uses (F H).—Semb. acc. Hard.* 469.

But, generally, he who claims in the *post.* shall not be subject to the trust. *Hard.* 469. *Vide Uses (F).*

(4 W 19.) Trust of a Term for Years.

(4 W 19.) *How it may be limited.*] How the trust of a chattel personal may be limited, *vide ante*, (4 G 2.)—When the trust of a term for a wife goes to the husband, *vide ante*, (2 M 9.)

If a term for years be limited to trustees; the trust shall have the same construction in equity as the term and estate itself shall have at common law. *D. of Norfolk's Case*, 28. *R. Pol.* 31.

And therefore, if it be limited in trust for *A.* for his life, and afterwards to *B.*, the trust for *B.* is good after the death of *A.* *Cont.* for the whole term vests in *A.* *Dy.* 74. *Cro. El.* 796. *Mo.* 748. 635.

But it has been several times resolved, that in a devise, grant, or limitation of the trust of a term, a possibility may be after a possibility; and therefore in regard that *A.* may die before the term expires, the latter possibility may be assigned over to another. *R. Pl. Com.* 523. 539. *R. Mo.* 758. 847. *R.* 8 Co. 96. b. 10 Co. 47. 52. b. 1 *Bul.* 192. *R.* 2 *Cro.* 198. 1 *Rel.* 612. l. 30. 610. l. 30. *Dy.* 277. 328. 358.

So, if a term be devised or limited in trust to *A.* for life, and afterwards to *B.* for life, and afterwards to 20 others for life successively, it is good, if all the lives are *in esse.* *Agreed. Ca. Ch.* 8. *Duke of Norfolk's Case*, 29. *R.* 1 *Sid.* 451. 1 *Vent.* 79.

So, if a term be devised or limited in trust to *A.* for life, and afterwards to his wife for life, and afterwards to their children for life, and afterwards to *B.* for life; the limitation to *B.* is good. *R. Ca. Ch.* 239. *Qu.* If the children were not *in esse*?

So, if it be to *A.* for 18 years, and then to *B.* for life, and afterwards to his wife for life, and then to the eldest issue male of *B.* for life, tho' he had no issue male at the time of the devise, or death of the devisor, yet the limitation to the issue male is good. *R. per three J.* 1 *Rel.* 612. l. 30. 937. l. 45. *Agr. D. of Norfolk's Case*, 29.; for it is limited upon a contingency which expires within the compass of a life.

So, a limitation to *A.* and his wife for life, and afterwards to their eldest son not then born, is good to the son, tho' not *in esse.* *Per Ld. Keeper Finch*, 1 *Mod.* 115.

So, a limitation to *A.* for life, and afterwards to his wife for life, and afterwards to *B.* if he survives *A.* and his wife, if not to the son of

of *B.* then living, and if he shall have no issue, to *D.* shall be a good limitation to *D.* if *B.* dies without issue before *A.* or his wife. *R. Ca. Ch.* 132.

So, to *A.* for 1000 years, upon trust that *B.* and his issue shall enjoy, and if *B.* dies without issue extant, or *enseint*, *C.* shall have it; if *B.* dies without issue, *C.* shall take. *R. per King*, 5 *Geo.* 2. 26.

So, a devise or limitation in trust to *A.*, and the issue of his body, and if he dies without issue and unmarried, to *B.* is good to *B.*; for the contingency expires within the life of *A.* *R. 2 Cro.* 462.

Or, to *A.* for life, and afterwards to *B.* and his issue, and if he dies without issue in the life of *A.* then to *C.*: the limitation to *C.* is good, *B.* being dead without issue in the life of *A.* *R. in Chancery per Bridgman, with Twisden and Rainsford. D. of Norfolk's Case*, 35, 6. *Ca. Ch.* 131. 1 *Ver.* 304.

So, a devise or limitation in trust to *A.* and his heirs, so long as *B.* has issue of his body, and if he dies without issue in the life of *A.*, then to *Edward*, is good to *Edward*; for the contingency expires in the life of *A.* *R. 34 Car. 2. per Lord Nottingham, contrary to the opinion of the two Chief Justices and the Chief Baron. Rev. per Lord Keeper North, but affirmed in Parliament*, 1 *Jac.* 2. *Duke of Norfolk's Case*. 1 *Ver.* 163.

So, a devise in trust for husband and wife for life, and afterwards to be assigned to the first son at his age of 21 years, and if he dies before 21, to the second, and so to the third son, &c. upon the same contingency, shall be good, tho' it be a contingency after a contingency; for the whole determines within 21 years. *R. 1 Ver.* 235. 304. *F. g.* 316.

So, a devise, &c. of a term to *A.* for life, and afterwards to his first son, and the heirs of his body, and so to every other son and the heirs of his body, and then to the first daughter and the heirs of her body; if *A.* has no son, but a daughter, she shall take; for she is the first person in whom the limitation takes effect. *R. 1 Sal.* 156. 2 *Ver.* 600.

So, to *A.* and the heirs of his body, and if he dies without issue in the life of *B.*, to *B.*, shall be good to *B.* *R. 1 Sal.* 225. *Skin.* 340. *Eq. Abr.* 192.

[Where the words of the devise of a trust of a term of years would make an express estate-tail in a freehold, the devise over of such term is void; but it is good if the words would only have made an estate-tail by implication: as, a devise to *A.* for life, remainder to the heirs of his body, remainder to *B.*; the remainder to *B.* is void; but a devise to *A.*, then to his children, and if they leave no issue at the time of their deaths, then to *B.*; this remainder to *B.* is good. *Atkinson v. Hutchinson*, *P.* 1734, 3 *P. W.* 258.]

So, if a father settles a term upon his son to be vested in trustees for the benefit of him and his issue, and if he has no issue, for *A.*, *B.* and *C.*, his sisters, and the son vests in trust for himself and his issue, and for default of issue, for *A.*, *B.* and *C.* If the son dies without issue, it shall be decreed to *A.*, *B.* and *C.* and not to his executor. *R. 1 Ch. R.* 17.

[If *A.* having a freehold lease for three lives to her, her executors, &c. for valuable consideration, assigns it to trustees to the use of her son *B.* for life, then to the use of his issue, and for want of such issue

issue to the use of C., her executors, &c. during the residue; the whole vests in the issue, (*i. e.* the children of B.); and A.'s executor, who is special occupant, cannot claim against it. *Williams v. Jekyll*, M. 1755, 2 Vef. 681.]

So, if a father makes an agreement that an annuity shall be paid to his daughter for her separate maintenance, that if the husband survives, he shall have it for his life, if they have issue, that the issue shall have what remains of the term, if they have no issue, the father shall have it; if the husband and wife have issue, who die in four years after the husband and wife, the father shall have it, and not the administrator of the issue. *Semb. per Cowper. But qu. 2 Ver. 693.*

So, if a term be devised to a son till the age of 21 years, and then to him for life, and then to such child to whom he shall give it, and if he dies without issue, to B. The limitation to B. shall be good; for it shall be construed, if he has no issue at his death. *F. g. 317. Eq. Abr. 193.*

So, to A. and his children, and if he dies before the term expired, not having issue then living, to B. *R. Eq. Abr. 193.*

[4 W 20.] *How it cannot.*] But a term for years cannot be entailed with remainder over; and therefore, if a term be devised, or limited in trust to A. and the heirs of his body, and for default of such issue to B., the limitation to B. is void; for it has a tendency to a perpetuity. *Dy. 7. a. Cont. Mo. 220. R. acc. Mo. 810. R. 1 Rol. 610. l. 40. 611. l. 30. R. Cro. Car. 230. 2 Rol. 129. R. 1 Sid. 37. 450. Agr. D. of Norfolk's Case, 28. R. 4 Inst. 87.*

[If A. devises his term of 1000 years to trustees, in trust for his son T. for so many years of the term as he shall live; and after his death for his issue-male for so many years, &c.; and when extinct, then for his second son W. and his issue in like manner; and then that the premises should come, descend, and continue, in the issue male of the name and family of the A.'s, which should be next of kin, for the residue of the term, and makes his son T. executor and residuary legatee; the residue of the term shall go to the executor of T., contrary to the will, because there is a plain affectation of a perpetuity. *Clare v. Clare, P. 7 G. 2. C. T. T. 21.*]

So, a limitation, after a death, without issue, in all cases is void; for a possibility so remote shall not be expected; as, if a term be limited to A. for life, and afterwards to B. for life, and afterwards to their children (not *in esse*) for their lives, and if A. and B. die without issue during the term, remainder of the term to C., the limitation to C. is void. *R. Pol. 30. 43.*

So, a devise to a son, and if he dies married or not married, without issue, to B. The limitation to B. is void. *R. D. of Norfolk's Case.*

So, if a devise or limitation be in trust to B. and his issue, and if the issue die without issue, to C. Tho' the issue takes nothing, yet the limitation to C. being after a death without issue, is void. *R. D. of Norfolk's Case, 28 Pol. 30.*

Or, to B. for life, and then to his first son in tail, and so to the second, third, and other sons in tail successively, and for default of issue to C. Tho' B. never has a son, and so the contingency never happens, yet the limitation to C. is void. *R. 1 Mod. 115. Ca. Ch. 229. 1 Ch.*

1 *Ch. R.* 175. 200, 1. *D. of Norfolk's Case*, 29. *R. Pol.* 34. 41. *Semb. cont.* 1 *Sal.* 156.

So, a devise or limitation to *A.* and his assigns, and if he dies without issue then living, to *B.*; tho' the limitation to *B.* depends in a manner upon the death of *A.* yet it is not good; for the law never expects a death without issue. *R. per tot Cur. and aff. in Error per seven J. Tanfield cont.* 2 *Cro.* 460. *Jon.* 15. 1 *Rol.* 613. l. 5.

—But this case was doubted. *D. of Norfolk's Case*, 35.

So, a devise to *A.*, and if he marries and has no issue living to enjoy, then to *B.* is not good to *B.* *R.* 3 *Lev.* 23.

So, a limitation to any one after the death of a life not *in esse*, is void. *Ca. Ch.* 8. *R. Pol.* 32. *R. cont. Pol.* 39.

And therefore, a limitation to *A.* for life, and afterwards to such person as *A.* shall nominate, and for want of nomination, or after the death of the nominee to his heir, is void to the heir. *Ca. Ch.* 8.

So, a limitation to one not *in esse*, after two limitations *in esse*, is void. *Semb. Ca. Ch.* 33.

But in such case, a limitation to husband and wife and the survivor of them, shall be intended to be but one limitation. *Ca. Ch.* 33.

So, if a limitation of a term be to *A.* after a life *in esse*, and also after a remainder to another not *in esse*; if there be no such person *in esse* at the time of the death of the tenant for life, the limitation to *A.* shall be good. *Dub.* 1 *Ver.* 462.

Yet, a limitation of a term, which attends an inheritance, may be intailed. *R.* 24 *Car.* 2. 1 *Vent.* 194. *Vide ante*, (4 *G* 5.)

Tho' the intail of the inheritance and of the term be by different clauses, or deeds executed at different times. *R.* 1 *Vent.* 195.

(4 *W* 21.) *What estate or interest the grantee of a term takes.*] If a term for years be limited to *A.* and the heirs of his body, he has the whole term in himself, and may dispose thereof. 10 *Co.* 87. *b.*

So, if a term be limited to *A.* for life, and afterwards to the heirs of the body of *A.*, the whole term vests in *A.* *R. Mo.* 809.

So long as he has heirs of his body. *Pol.* 24.

But if *A.* dies without issue, the term reverts to the executor of the devisor. *Semb. Mo.* 809. *Pol.* 24. *R. cont.* 1. *Co.* 87. *D. acc.* 1 *Sid.* 37. *cont. per Ld. Nottingham*, 1 *Mod.* 115. *Ca. Ch.* 230. and in the *D. of Norfolk's Case*, 34. and the opinion of Coke denied by him. *R. cont.* 1 *Rol.* 611. l. 30. *R. cont.* 1 *Sid.* 451. but *Twifden acc.* And it was *R. acc.* in *C. B. Hil.* 9 *W.* 3. *Inter Eyre and Falkner*, *Rot.* 1384. And *Treby Ch. J.* produced a report of the case, 1 *Sid.* 451. to the contrary. But the case of *Eyre and Falkner* was, a devise to *A.* for life, afterwards to *B.* and others for life successively, if the term so long continued; and not to the heirs of the body. 1 *Sal.* 231.

Tho' *A.* has disposed of the term; for he can dispose of it only so long as he has issue. *Semb. Mo.* 809. *Pol.* 24.

And if *A.* dies leaving issue of his body, the term goes to his executor, not to the issue. *R.* 1 *Rol.* 611. l. 35. *R. Pol.* 25. *R.* 10 *Co.* 87. *b.* *Per Lord Nottingham, D. of Norfolk's Case*, 34. *Per Ch. J.* 1 *Sid.* 37. 451.

So, if a term be devised to *A.* for life, and afterwards to his first, second, and other sons, (not *in esse*,) remainder to his (the devisor's) own right heirs; the remainder to his heirs is void; for the term reverts to the devisor, and goes to his executor or administrator. *Semb. Pol. 32.*

If it is to *A.* and his wife and their children not *in esse*, it shall not be an intail; nor shall the children take jointly with their parents. *R. 1 Ch. R. 111.*

If a term be limited to *A.* for life, and afterwards to *B.* for life, the residue of the term not disposed of goes to the grantor, or the executors of the devisor. *Qu. per Me.—Vide Pol. 44.* *R.* that it goes to the executor of the devisor, in *C. B. H. 8 W. 3. rot. 1384. inter Eyre and Falkner. 1 Sal. 231.*

If *A.* upon his marriage vests a term, of which he was possessed, in trust for him and his wife and their heirs male, and if he has none, for daughters, and then assigns the term to be sold for payment of debts; the term shall be sold, notwithstanding the trust. *R. 1 Ch. R. 12.*

If a term be limited to *A.* for life, and afterwards to his first, second, and other sons not *in esse* for life, or in tail, which limitations are void; the term after the death of *A.* without issue goes to the executor of the grantor. *Dub.* Whether it goes to the executor of *A.* or the executor of the grantor, for *A.* was also executor to the grantor. *Pol. 28.*

Where the limitation was to *A.* and his assigns, and the limitations over were void, *R.* that it goes to the executor of *A.* *Pol. 36.*

So, if a term be limited by *A.* in trust for himself for life, and afterwards to his wife for life, and afterwards to such person as *A.* shall nominate, and for want of nomination, or upon the death of the nominee, to his heir; the limitation to the heir is void, and the residue of the term goes to *A.* the grantor. *R. Ca. Ch. 8. Pol. 32.*

But if *A.* makes a nomination, it goes to the nominee, his executors or administrators, tho' they are not named. *R. Ca. Ch. 9.*

If a term be limited to *A.* and afterwards to his wife, and afterwards to their issue; it is of the same effect as if it was limited to them and the heirs of their bodies, if the issue be not *in esse.* *Ca. Ch. 266. (2 Ca. Ch. 115)*

But if a term be limited to *A.* for life, and afterwards to his wife for life, and afterwards to the heirs male of the body of *A.*; this goes to the heirs male; for a term cannot be intailed, and therefore the words *heirs male of the body of A.* are *designatio persona.* *Semb. cont. Mo. 809. Pol. 24. R. cont. inter Peacock and Spooner in Chancery, Pasch. 1688. But that decree was reversed per commissioners of the Great Seal, and the reversal affirmed in parliament, 2 Ver. 43. 195. 362. Qu. If the heir male was not in esse at the time of the limitation? Vide 5 Geo. 2. 30, 31. this case cited. (Vide 2 Ver. 668.)*

If a term be limited to *A.* for life, and afterwards to his son and the heirs of his body; *A.* has the whole term in him, and the son only a possibility. *R. 3 Lev. 265. 1 Sal. 231.*

And therefore, he shall plead that he is possessed of the whole term. *R. 3 Lev. 265.*

And he shall pay the rent, answer for waste, &c. *R. 10 Co. And 47. a.*

And shall maintain covenant as an assignee. *R. 2 Vent. 128.*

³ *Lev. 264.*

And if a devisee, &c. in remainder dies in the lifetime of the first devisee, his estate is gone; for it was only a possibility. *D. 1 Sid. 188. Semb. Ca. Ch. 132.*

Yet his executor or administrator shall have it after the death of the first devisee, if it was not devised over after the death of that remainder-man. *R. 10 Co. 51. b. R. 2 Cro. 510. R. per King, 5 Geo. 2. 26.*

But the first devisee cannot destroy such a possibility; tho' he suffers a common recovery of his estate. *R. 8 Co. 96. a. R. 10 Co. 47. b.*

Or, makes a feoffment after he in remainder comes in esse. *Per three J. 1 Rol. 937. l. 45. R. Pol. 26.*

Tho' the feoffment be with warranty. *R. Pol. 26.*

So, if he purchases the reversion by which his interest is merged. *R. 10 Co. 52. a. b.*

So, a devisee in remainder cannot grant his possibility. *R. 4 Co. 66. R. 10 Co. 47. b. D. 1 Sid. 188. R. 10 Co. 52. b.*

But he may release it to the first devisee being in possession. *R. 10 Co. 47. b.*

And the trust of a term limited to one in remainder may be assigned in equity. *Ca. Ch. 8. R. Pol. 32. Vide ante (2 H). R. cont. 3 Lev. 427.*

Where a devise was by one, who had only a possibility, if the next in remainder died without issue. *R. cont. 2 Ver. 563.*

(4 W 22.) *Trust to attend the inheritance.*] If a man purchases the inheritance in the name of trustees, and has a term for years assigned to himself, it shall be in trust to attend the inheritance; tho' it is not said so in the assignment. *R. 1 Ver. 1. 2 Ca. Ch. 49. 55. 1 Ver. 188, 9. Eq. Abr. 241. Vide ante, (4 G 5.)*

So, if he had a term for years in himself, and afterwards purchases the inheritance in the name of trustees. *R. 1 Ver. 104.*

So, if he limits a term upon a trust to be declared by his will in writing, and if he makes no disposition, to attend the inheritance; he by a nuncupative will gives the whole to A. and dies without an heir; the term shall attend the escheat. *R. 1 Ver. 340. 357.*

[But if any circumstance prevent him from purchasing the whole interest, the term shall be in gross, unless there be an express declaration that it shall attend the inheritance. *Vide 1 Brown, 69.*]

If lands be of the nature of gavelkind, the term shall be distributed for the benefit of each heir. *1 Ver. 357.*

If a term assigned to two sons on the purchase of the father, was a mortgage, and one son dies, the survivor shall not have the benefit, upon payment of the money due upon the mortgage. *R. 1 Ch. R. 119.*

If a term be assigned in trust to attend the inheritance, it shall not be made use of to defeat a tenant by the curtesy. *R. 2 Ver. 324.*

If there be a term to attend the inheritance, a devise of the inheritance

heritance defective for want of three witnesses, does not pass the term. *R. Eq. R. 170.*

[A term attendant on the inheritance is part of it, and cannot be disannexed by the court, nor pass by a will which would not pass the inheritance. *Villers v. Villers, M. 1740, 2 Atkyns, 71.*]

(4 W 23.) *To preserve contingent uses.*] Trustees to preserve contingent uses, where the estate was mortgaged and subject to a judgment, and afterwards settled upon marriage to the use of the mortgagor for life, and afterwards to his wife for life, then to trustees, and to the first and other sons in tail, shall be decreed to join with the mortgagor in a sale, where the wife assents and no son is born, and the mortgage cannot be otherwise paid. *R. 2 Ver. 303.*

So, if a term be vested in *A.* to the use of his (the testator's) will, and a devise is to *B.* in tail, remainder to *A.* in fee, and *B.* suffers a recovery and grants to *C.*; it shall be decreed that *A.* shall assign the term for the benefit of *C.* *R. 2 Mod. 9.*

But a trustee to preserve contingent uses shall not be decreed to join in a sale for payment of debts, tho' there has been no issue for twelve years, nor any probability of issue afterwards. *Dub. 1 Ver. 181.*

[If *A.* devises his lands after the death of his wife, and a term of 1000 years, to his son *B.* for 99 years, without waste; remainder to trustees in fee, to preserve contingent remainders, remainder to first and other sons of *B.*, remainder to his second son *C.* for 99 years, remainder to trustees to preserve, &c. remainder to the first and other sons, remainder to his own younger sons, in like manner, remainder to his daughters, remainder to his heirs, and *A.* dies, and *B.* dies without issue, and *C.* marries, and has a son who is of age, and they two become indebted by bond, and make assignments of the settled estate in trust for creditors, and agree to suffer recovery: to make this provision for creditors effectual, the court will not decree to trustees to join in the recovery; tho' had they done it voluntarily, it might possibly not have been a breach of trust. *Woodhouse v. Hoskins, H. 1743, 3 Atkyns, 22.*]

[Equity will not direct a trustee to preserve contingent remainders, to join with tenant in tail, to make a tenant to the *præcipe*, in order to sell the estate to prejudice the remainder-man, tho' if he have joined, the court will not punish him as for a breach of trust. *Ambler, 774. 1 Brown, 534.*]

So, a breach of trust shall never be decreed; as, if a marriage settlement be to *A.* for life, and afterwards to the wife for a jointure, then to trustees to preserve contingent uses, then to the first and other sons, &c. the trustees shall not be decreed to join in a sale, tho' the portion was not paid, and tho' it be for payment of debts. *R. 2 Ca. Ch. 144.*

So, if a father be circumvented to do an act, by which the contingent estates are destroyed, the person defeated shall be relieved in equity. *1 Ver. 444. 447.*

So, if trustees to preserve contingent remainders join in a feoffment, or release to the tenant for life, whereby the remainders are merged; it will be a breach of their trust, and the feoffment shall be

to the former uses; and then the trustees shall purchase another estate to the same uses, where the feoffee is a purchaser for a valuable consideration, without notice. *R. 2 P. W. 612.*

[Estate in trustees sufficient to support a contingent remainder, tho' the prior estate for life fails. *2 Ves. jun. 234.*]

(4 W 24.) *To raise portions.*] If a term be in trust to raise portions for children, and be afterwards merged by the descent of the inheritance, equity will revive the term for the benefit of the children. *2 Ver. 91. 208. Vide ante, (3 Z 4.)*

[Equitable doctrine in regard to merges. *Lord Compton v. Oxenden, 2 Ves. jun. 264.*]

So, if *A.* creates a term for portions for his daughters, and afterwards limits the estate to his own right heirs, and dies having only one daughter his heir; the term shall not be merged in equity, unless it be for the benefit of the heir. *2 Ver. 352.*

But where, by articles upon marriage, 1200*l.* was agreed to be vested in land to be settled upon the husband for life, to his wife for life, to the first and other sons in tail, then for a term to trustees for portions for the daughters, and afterwards to the right heirs of the husband, who dies before the settlement made, having only a daughter; the land shall be decreed to the daughter and her heirs, subject to the jointure, without the term for portions, which was of no use to the daughter and heir. *2 Ver. 351.*

(4 W 25.) Breach of Trust; how punished.

[A court of equity can lay hold of every breach of trust, whether the person guilty is in a private or a public capacity. *Charitable Corporation v. Sutton, T. 1742, 2 Atkyns, 400.*]

[Trustees to preserve contingent remainders may be guilty of breach of trust, and are punishable for it. *Garth v. Cotton, H. 1753, 3 Atkyns, 751. T. 1750, 1 Ves. 524. 546.*]

[A breach of trust is considered as a simple contract debt, and falls on trustee's personal estate only. *Vernon v. Vawdry, H. 1740, 2 Atkyns, 119. 1 Term Rep. 42.*]

[*A.* and *B.* trustees under a deed, and neither to answer for the other; *A.* receives money, and by writing under hand and seal acknowledges it, and that *B.* received no part, he never puts it out, and dies. This writing is a specialty, good against the executor, but not against the heir; but the *cestuy que trust*, in case of deficiency, shall stand in the place of the personal estate. *Gifford v. Manley, T. 9 G. 2. C. T. T. 109.*]

If a man acts contrary to his trust, he shall be decreed to make satisfaction; as, if there are articles between *A.* and *B.* to make a jointure on the wife of *A.*, and by importunity *B.* releases his covenant, and delivers up the articles to *A.*; he shall make a recompence to the wife and the children of the marriage, for his breach of trust. *Semb. Ca. Ch. 125.*

If a trustee in a recognizance releases the recognizance, he shall pay the principal and interest, if it does not exceed the penalty. *R. 1 Ver. 342.*

If a judgment be to *A.* for the security of articles for making a jointure, and *A.* by corruption acknowledges satisfaction, whereby the

the jointure is defeated; *A.* shall make good to the wife all her damage. *R. 2 Ver. 620.*

Yet if *A.* had a colour to do it, and did not act by corruption, he shall only pay costs. *2 Ver. 619.*

So, if a trustee sells the land, and after a fine and nonclaim for five years, repurchases it for a valuable consideration, equity will decree the land to the *cestuy que trust*. *1 Ver. 60, 61. 84. 145. 2 Ca. Ch. 126.*

So, if a trustee sells to *A.* who has notice of the trust, who levies a fine, and five years pass; the *cestuy que trust* shall not be barred; for *A.* having notice shall be a trustee for him. *Eq. Abr. 256. 1 Ver. 149.*

[A trustee who conceals the breach of trust of his co-trustee shall be equally liable with him for the money to the *cestuy que trust*. *1 Brown, 68.*]

[If trustees to preserve contingent remainders for children unborn, join to defeat them, (tho' under pretence of raising money to pay testator's debts, and tho' the child, who would have been tenant in tail, is afterwards made tenant for life,) it is a breach of trust relievable in equity: if there is a purchaser without notice for a valuable consideration, the trustees shall answer it; if not, the estates shall be reconveyed to the former uses. *Manfel v. Manfel, T. 6 G. 2. C. T. T. 252.*]

[If trustees are appointed to receive rents, and apply them for the maintenance of *A.* and *B.* till 25, and to raise 5000 *l.* for *A.*'s portion, and for other purposes, and then the estate is devised to *B.*, and the trustees let *B.* into possession before 25, they shall be answerable for what is received by *B.* *Okeden v. Okeden, M. 1738, 1 Atkyns, 550.*]

[If after marriage a husband conveys his wife's fortune to a trustee for her separate use, and the trustee is guilty of a breach of trust, (by delivering up the fortune to the husband,) the court will decree him to make satisfaction to the *cestuy que trust*. *Smith v. French, H. 1741, 2 Atkyns, 243.*]

[But if it appears that the wife had joined earnestly in the request to the trustee, (her mother,) promised to release, lived with, and was maintained by her till the husband's death, and for years after, till her second marriage, offered to release while sole, and that on the treaty for the second marriage neither she nor her husband mentioned it, the court will not decree satisfaction. *Ibid.*]

[Trustee mistaking his power, sold stock without authority; decreed to replace it immediately; if at a less price, to invest the surplus in the same stock to the same uses. *Earl Paulet v. Herbert, 1 Ves. jun. 297.*]

[Trustees, who joined with remainder-man in ejecting *cestuy que trust* for life, obliged to make good subsequent accidental deficiencies of the rent: inquiry directed as to the interference of remainder-man. *Kaye v. Powel, 1 Ves. jun. 408.*]

Settlement upon marriage of stock, the property of the wife, in trust from time to time to receive the dividends, and pay them into the hands of the wife for her sole and separate use, her receipt to be a discharge; after her decease, if the husband should survive, for him for life; and after the decease of the survivor, to transfer the principal among

among the children according to her appointment by will; in default thereof, equally; if no children, according to her appointment by will. The trustees, with the privity of the wife, sold the stock, and paid the money to the husband, taking his bond of indemnity: he died insolvent: upon the bill of the widow and children, the fund having been replaced by the trustees, was transferred to the Accountant General upon the trusts of the settlement; the trustees decreed to pay the dividends to the widow from the death of the husband, with costs. *Whistler v. Newman*, 4 *Ves. jun.* 129.]

[Trustee ordered to pay costs on misconduct. *Dawson v. Parrot*, 3 *Bro. C. C.* 236.]

(4 W 26.) *Tho' the breach be purged as to a stranger.*] So, tho' the breach of trust was purged, he who was guilty of the breach shall not take advantage of it; as, if *A.* sells for a valuable consideration, in breach of his trust, and the purchaser levies a fine, and five years pass without claim, and afterwards *A.* purchases the same land, he shall not avoid the trust by the fine and non-claim. *R. 2 Ca. Ch.* 126. *Eq. Abr.* 256.

(4 W 27.) *Tho' the trust estate lies out of the jurisdiction of the court.*] So, a breach of trust shall be remedied, tho' the land be out of the jurisdiction of the court; as, if the land lies in *Ireland*, but the trustee lives within the jurisdiction of the court, *Chancery* will proceed against his person, tho' it does not touch the profits of the land. *2 Ca. Ch.* 189. *1 Ver.* 76. 135. *R. 1 Ver.* 405. 419. *Vide Jurisdiction, ante* (3 X).

If one joint-tenant of land in *Ireland*, takes the whole profits, and comes into *England*, he shall account for the profits here. *R. 2 Ca. Ch.* 214.

So, if an agreement be that portions shall be paid, and that a receiver in the *Ile of Man* shall pay them out of the rents there; tho' a decree does not bind lands there, yet it shall be against the person. *R. Ca. Ch.* 221.

If a matter arises within a county palatine, and the person lives here, *Chancery* will compel him to do what he ought.

So, if a mortgage be of the island of *Sarke*, or land in *Jersey*, *Guernsey*, &c. *Chancery* will compel the mortgagor, being here, to redeem or be foreclosed. *R. 1 Sal.* 404. *2 Ver.* 494.

So, if a man obtains a settlement of land in *Ireland* by practice. *R. upon Plea*, *1 Ver.* 76. 239. 405. 419.

[If trustee purchases land in *Ireland* with trust-money, the court cannot charge it therewith; but if the specialty creditors exhaust the personal, the simple contract creditors shall stand in their place. *Cox v. Bateman*, *T.* 1750, *2 Ves.* 19.]

(4 W 28.) *Particeps criminis. Who shall be.*] So, every one who is *particeps criminis* shall be affected by the breach of a trust.

As, if a man purchase with notice of the trust. *Vide ante*, (2 C 2. —4 C 1.—4 I 3.)

Tho' he pays a valuable consideration. *1 Ver.* 60. 149. *Eq. Abr.* 256.

Tho'

Tho' after the purchase he levies a fine, and five years pass; for being a trustee, the fine is fraudulent, 1 Ver. 149.

Tho' the trust be for creditors, who should claim within a year, and after the year an assignment is made to B. who does not know that the debts were not paid; for he had notice of the trust. 1 Ver. 319.

If A. by fraud obtains administration to B., and sells the stock of B. to D. who knows of the fraud; D. shall be decreed to refund. R. Ch. R. 298. 430.

So, if a trustee sells to A. not having notice of the trust, who levies a fine, and five years pass, and then conveys to the trustee; the trustee shall take upon the prior trust, notwithstanding the fine. Eq. Abr. 256.

So, if a man encourages a purchaser, where he himself has a title; as, if the heir at law encourages A. to purchase an annuity of his younger brother under the will of his father, when the estate was intailed upon the heir, by a settlement prior to the will. R. that he shall be decreed to confirm the purchase. 1 Ver. 136. Eq. Ca. 96.

If copyhold or other land belong to a younger son, and the elder brother sells it, of whom the younger brother knowing of such sale, accepts an annuity of equal annual value, and suffers the purchaser to enjoy during his brother's life, but afterwards seeks to avoid the purchase; he shall be obliged to confirm it. 1 Ver. 325.

If A. takes a mortgage from B., but beforehand inquires of C. whether he had any money due to him from B. and he denies that he had; tho' he had a prior mortgage, A. shall be preferred to C. R. 2 Ver. 554.

If A. upon the marriage of her son agrees to release her dower, she shall be decreed to do it, tho' it was upon a false suggestion. R. 2 Ver. 133.

If A. having a term be a witness to a settlement made by her son on his marriage, whereby that term is settled, she shall be decreed to make good the settlement. R. 2 Ver. 150.

So, if a prior mortgagee be a witness to a second mortgage, and does not discover his mortgage, he shall be postponed. 2 Ver. 151. Eq. Ca. 38.

If A. having a deed by which an estate is intailed on him after the death of B. be privy to the marriage of B. and ingrosses articles, whereby that estate is to be settled on the wife for a jointure; he shall never defeat the jointure by such intail. R. 2 Ver. 239.

If A. has a statute for 1200 l. of B. and afterwards is counsel for C. who lends B. 200 l. upon mortgage; the estate in mortgage shall not be charged with the statute at the suit of A. till C. is satisfied the whole due upon his mortgage. R. 2 Ver. 370.

So, if A. having notice of his own title, after the death of his mother, encourages the making of a settlement of the same land upon the marriage of B. his sister. R. Eq. Ca. 37.

Or, if A. has knowledge of the settlement, tho' he does not encourage it, and tho' B. afterwards sells without his privy. Eq. Ca. 37. Dub. Eq. Ca. 96.

Tho' A. be an infant or feme-covert. Eq. Ca. 37.

So,

So, if a purchaser or mortgagee hearing of a prior settlement in trust, obtains an assignment from the trustee; it shall be subject to the trust, tho' it was intended to support his purchase or mortgage; for it was a breach of trust, he having notice of the trust. *R. 2 Ver. 271.*

If a mortgagor presents *A.* upon simony, but afterwards waives him, and presents *B.*, who hearing that the king intended to make a presentation, afterwards resigns and takes a new presentation from the mortgagor and also from the mortgagee; the presentation by the mortgagee shall not be made use of by *B.* to defend him against the presentation by the king. *R. 2 Ver. 549, 550.*

[If a trustee errs, or is guilty of a breach of trust, yet if he goes out of it with the approbation of the *cestuy que trust*, it must first be made good out of the person's estate so consenting. *Trafford v. Boehm*, *H. 1746, 3 Atkyns, 440.*]

[If a committee-man of a public company is guilty of gross non-attendance, and leaves the management entirely to others, he may be guilty of the breach of trust committed by them; and this tho' he had no benefit from the trust. *Charitable Corporation v. Sutton*, *T. 1742, 2 Atkyns, 400.*]

[If there is a supine negligence in all, by which a gross complicated loss happens, they are guilty. *Ibid.*]

(4 W 29.) *Who not.*] But if a man has a legal estate, or interest in land subject to a trust, a purchaser *bonâ fide* shall not be affected by the trust; as, if the devisee of a term, subject to debts and legacies, enters by the assent of the executor, and sells to *A. bonâ fide*, *A.* shall not be prejudiced. *Ca. Ch. 257.*

So, if a man joins for conformity, he shall not be charged thereby for the breach of a trust; as, if two trustees join in a receipt for money, where one only receives it, he only shall be charged. *1 Sal. 318.*

So, if two executors give a discharge for money, and one only receives it, he alone shall be charged, as to legacies. *Ibid.*

Yet, both shall be charged to creditors. *R. 1 Sal. 318. Semb. Bridg. 38.*

So, if one trustee only acts in the trust, the other shall not be charged. *R. Bridg. 37, 8.*

So, if two trustees join in a sale and in a receipt for the money, and one of them receives part, and the other the other part, and becomes insolvent, his companion shall be charged only for so much as he received. *R. 2 Ver. 504. 515.*

So, if a mortgagor pretends that he was in treaty for a lease, which would be an improvement to the estate, and desires the mortgagee will permit a sight of the original grant to satisfy the intended lessee that he had a power to make such lease, and the mortgagor, having obtained such original grant, makes a mortgage to another person; the first mortgagee, not privy to his design, shall not be prejudiced thereby. *R. 2 Ver. 726.*

So, if there be tenant for life, remainder to trustees in fee, upon trust for the first and other sons of the tenant for life, in tail, &c. if the tenant for life, the trustees, and the issue in tail join in a feoffment

ment and fine, it is not a breach of trust in the trustees, for they are only entrusted for the issue in tail. *R. 2 Ver. 754.*

But if two executors account for a personal estate, in which there is 200*l.* *East-India* stock, which they afterwards sell, and one receives 100*l.* and becomes insolvent, the other shall be charged for the whole; for there was no necessity for his joining. *R. Ver. 504. 515. 570.*

So, if two trustees join in a sale and receipt for the money, both shall be charged, where it does not appear how much each received. *2 Ver. 516.*

[A trustee joining in a receipt, and in reconveyance of a mortgaged estate, tho' he does not receive the money, is liable; and the receipt being in evidence, no inquiry can be directed as to the fact. *Scurfield v. Howes, 3 Bro. C. C. 90.*]

[Bank-stock specifically bequeathed to *A.* in trust to pay a bond debt to himself, and as to the rest for *B.* for life, remainder over; *B.* being executor, as well as trustee, transferred to persons not entitled under the will; the bank held not to be chargeable. *Hartig v. The Bank of England, 3 Ves. jun. 55.*]

(4 W 30.) *What shall be a breach of trust. If the trustee makes a private advantage to himself.*] So, a trustee shall not take advantage by the management of the trust; and therefore, if a trustee compounds a debt, or a mortgage, at an under-value, it shall not be for his own benefit, but for the advantage of the trust estate. *1 Sal. 155.*

[So, if a trustee for the sale of estates for the payment of debts purchase them himself, by taking undue advantage of the confidence reposed in him by the vendor, and previously to the purchase sell them at an highly advanced price, he shall be a trustee for the original vendor as to the sums produced by the second sale. *2 Brown, 400.*]

[So, if a trustee of a will which directed money to be lent at the best interest, by consent of his co-trustee, keep it at 4 per cent., he shall be decreed to pay 5 per cent. *Id. 430.*]

[A trustee shall not purchase lands devised to him for payment of debts; and tho' it is at a public sale, and in another person's name, it shall not be good. *Whelpdale v. Cookson, P. 1747, 1 Ves. 9.*]

[If a trustee lends the money of an infant, without the approbation of *Chancery*, upon an improper security, he shall answer to the infant for the money if it be lost; as, if he lends it on the single bond of *B.*, who fails, tho' then of good credit. *R. Eq. R. 10. Vide infra, (4 W 31.)*]

[If a trustee transfers stock, it is a breach of trust; and *cestui que trust* may have the stock, or the money it sold for. *Harrison v. Harrison, H. 1740, 2 Atkyns, 121. Vide 2 Brown, 657.*]

[Where stock in trust for *A.* for life, with a power in trustees to sell out, and remainder over, is sold out just before a dividend, to which *A.* would be entitled, he shall have no allowance in the price, for the dividend which would have become due, if the stocks had not been sold. *2 Brown, 653.*]

[If money is settled to be laid out in government funds, or other good securities, and it is laid out in the stock of a trading company,

(as

(as South-Sea or bank,) it is a breach of trust; it should be in annuities. *Trafford v. Boehm*, H. 1746, 3 *Atkyns*, 440.]

So, if he purchases land with the money of the infant, without the allowance of the court; if it be disallowed by the infant at his full age. *Eq. R.* 10.

But this shall be a breach of trust, or not, at the discretion of the court; for every thing which the court can allow a trustee to do, it may allow when done; and therefore the purchase of a copyhold contiguous, at the request of the next of kin, was allowed, tho' disapproved by the husband of the infant. *Eq. R.* 10.

[Trustees for supporting contingent remainders are guilty of breach of trust in joining to destroy them, whether the settlement be voluntary, for valuable consideration, or by will; and tho' equity will, in some cases, compel trustees to join in such conveyance as will destroy contingent remainders, yet it is then to answer the uses originally intended by the settlement, but never to overturn all the uses of a settlement. *Symance v. Tattam*, T. 1737, 1 *Atkyns*, 613.]

[Committee-men, tho' not privy to an original design, yet may be guilty by conniving, and not using the proper power vested in them to prevent the ill consequences of a confederacy. *Charitable Corporation v. Sutton*, T. 1742, 2 *Atkyns*, 400.]

[Trustee having engaged trust property in an adventure, cannot sell either to himself or to another. 1 *Ves. jun.* 42.]

[In case of two estates, one in trust, and the other belonging to the trustee, the court will not permit him to act for his own or infant's benefit as he pleases. *Ibid.* 43.]

[There is no general rule that a trustee to sell shall not be himself the purchaser; but he shall not thereby gain profit to himself.]

[One of several trustees to sell having purchased, and afterwards sold at a profit, was therefore decreed to account for that profit with costs. *Whitchote v. Lawrence*, 3 *Ves. jun.* 740.]

[Trustee for the purchase of land died without personal assets; but having purchased land; the estates purchased were held not liable to the trust, there being no ground to presume that they were purchased in execution of the trust. *Perry v. Philips*, 4 *Ves. jun.* 108.]

[One trustee suffering the other to have trust money on a note of hand, held liable. *Keble v. Thompson*, 3 *Bro. C. C.* 112.]

Vide ante, (4 W 28.)

(4 W 31.) *What shall not be a breach of trust.*] But, if A. leases lands for 1000 years to B. and others, upon trust to be sold for payment of debts in a schedule annexed; it will not be a breach of trust, if the trustees afterwards take an estate of inheritance from A. whereby the term is merged, upon trust to pay those and also other debts. *R. Ch. R.* 479.

If the trustee of a term for 99 years for payment of debts and legacies, agrees for an under-lease, and then the debts and legacies are satisfied by sale of timber; the lease shall be decreed, tho' he in reversion dissents. 2 *Ver.* 647.

[If a trustee pay money to a banker who is in credit at the time, but afterwards fails, the trustee is not answerable. *Ambler*, 219.]

[So, if a steward, employed in the receipt of rents, take bills in the country from persons of credit at the time, in order to remit the money

money to *London*, and the bills are protested, and the money lost; the steward is not answerable. *Ambler*, 219.]

[If there is a mere falling of stock, without fault of a trustee, he shall not be liable to make good the deficiency, tho' he has paid interest for the whole sum after the fall of the stock, amounting to more than the dividends, but not so much as the common interest. *Jackson v. Jackson*, P. 1737, 1 *Atkyns*, 513.]

[Tho' there are no negative words in the deed, yet the court will not make a trustee liable for more than he has received. *Leigh v. Barry*, M. 1747, 3 *Atkyns*, 583.]

[Or, if several trustees (*not executors*) join in a receipt; he only who received shall be liable. *Ibid.* *Ambler*, 219.]

[But if trustees bind themselves to be liable for the acts of each other, the court will not relieve. *Ibid.*]

Vide ante, (4 W 29.)

(4 W 32.) *If the trustee act with the privity of the cestuy que trust.* So, it shall not be a breach of trust if the trustee compounds a debt with the assent of the *cestuy que trust*. R. Ch. R. 58.

[Nor, if he applies the trust property to what turns out a losing adventure, if without fraud or negligence. 1 *Ves. jun.* 41.]

[Nor, for having engaged infant's name in an adventure, if, afraid of the consequences, he does not engage the property. *Ibid.* 42. *Morton Eden's Case* in Dom. Proc. contr.]

(4 X) Waste.

[IF a person threatens or insists on his right to commit waste, as to open mines reserved, a bill may be brought to restrain him, tho' no waste actually committed. *Gibson v. Smith*, P. 1741, 2 *Atkyns*, 182.]

[If tenant for life insists on a right to commit waste, the reversioner may have an injunction. *Ibid.*]

Upon an *affidavit* of waste committed, *Chancery* will grant an injunction to stay the waste. *Vide ante*, (D 11.)

So, if tenant for life, without impeachment of waste, commits voluntary waste, an injunction shall be granted to stay such voluntary waste. 2 *Ver.* 738.

[The court will not entertain a bill for an account, and satisfaction for waste, (in cutting timber,) brought after determination of the tenant's estate by assignment, unless an injunction is prayed for. *Jesus College v. Bloome*, M. 1745, 3 *Atkyns*, 262.]

[Devise to A. for life, "with full liberty to cut timber and underwood for repairs, or for her own use, in fuel, or otherwise, but not to sell;" remainder to B. for life, remainder to his children in tail. A. had a right to cut and sell the underwood; for words of restraint, unless there be a provision for the consequence of violation, operate as a mere recommendation. *Semb. Pigot v. Bullock*, 1 *Ves. jun.* 479. 3 *Bro. C. C.* 539. S. C.]

[But B. clearly had no property in the underwood till he came into possession of the estate, and therefore not entitled to an account of what A. cut, whether wrongfully or not. *Ibid.*]

[Tenant for life, with liberty to cut timber at *seasonable times*, is not

to cut trees planted for ornament or shelter to the mansion house, or sapling trees not fit to be cut, or felled for timber. *Chamberlayne v. Drummer*, 3 Bro. C. C. 549.]

[If a power be given by will to tenant for life, to cut trees as four trustees shall allow and direct; on the death of all the trustees, the power remains; but the court will preserve the check, and refer it to a master to see what trees are proper to be cut. *Ambler*, 508.]

And after a settlement upon his son in marriage, if he commits voluntary waste and destruction, to the prejudice of his son in remainder, he shall make reparation or recompence for the waste committed. *R. 2 Ver.* 738.

[If *A.*, tenant for 99 years, if he so long live, without waste, except voluntary; remainder to trustees to preserve, &c. remainder to first and other sons; remainder to *B.* in fee; agrees, before a son born, with *B.*, to whom he is indebted on mortgage, to cut down timber, *B.* not to take advantage of the waste, and the money to be divided, which is done; and then *A.* has a son, who attains 21, and suffers recovery to himself and his heirs; the executors of *B.* admitting assents shall refund, with interest at 4 per cent. from filing the bill. *Garth v. Cotton*, H. 1753, 3 *Atkyns*, 751. 1 *Ves.* 524. 546.]

[Trustees to preserve contingent remainders may have an injunction to stay waste before the contingent remainder-man is *in esse*; and if waste is committed afterwards, the offenders shall pay the value, which shall be laid up for the contingent uses. *Ibid.*]

But if an estate be devised to *A.* for life, and afterward to *B.* in fee, if he pays certain legacies within such a time, and if he does not pay them to *C.*, he paying those legacies; equity will allow *B.* to cut down timber growing upon the land, for payment of the legacies, without the assent of *A.* or *C.*, paying for the damage to *A.*, if any is done. *R. 2 Ver.* 152.

[Tenant for life, without waste, may cut trees (even not full grown) tho' not to the prejudice of remainder-man. *Aston v. Aston*, T. 1749, 1 *Ves.* 264.]

[But if a man by will make his wife tenant for life, and by codicil give her permission to cut down timber during widowhood, at seasonable times; she shall be restrained from cutting ornamental or immature timber. 1 *Brown*, 166.]

[But if a term is created to reimburse tenant for life, without waste, the expences of supporting the estate, and he cuts all the timber, he shall not be allowed any thing under the term for buying timber for repairs, without reimbursing the estate for timber unreasonably cut. *Ibid.*]

So, if a term be assigned in trust for *A.* for life, and afterwards for *B.* for life, without impeachment of waste; equity will allow *B.* to cut down timber for his maintenance in the lifetime of *A.* *R. 2 Ver.* 218.

If the lessee of a tenant for life has committed a waste *sparsim*, but has also improved the land, he shall be aided on payment for the waste, and acceptance of a lease with an increase of rent. *Q. 2 Ver.* 263.

[Tenant for life, tho' without impeachment of waste, is obliged to keep tenants' houses in repair, unless the charge is excessive; and shall not suffer them to run to ruin. *Pateriche v. Powlet*, T. 1742, 2 *Atkyns*, 383.]

[If son brings bill against his father, tenant for life, without waste, for waste in taking up a floor he had laid down, transplanting young oaks he had planted, turning arable to pasture, and *vice versa*, and no injunction is applied for, the bill will be dismissed. *Piers v. Piers*, T. 1750, 1 *Ves.* 521.]

[If guardian converts infant's ancient pasture into arable, it is waste, tho' he alleges it was on account of the distemper among cattle. *Clarke v. Thorpe*, H. 1750, 2 *Ves.* 232.]

CHAPPEL.

Vide Esglise (D).

CHAPTER.

Vide Ecclesiastical Persons, (C 3.)

CHARITABLE USES.

Vide Chancery, (2 N 1, &c.)—*Uses*, (N 1, &c.)

CHARTER.

Vide Franchises, (F 5, &c.)—*Justices of Peace*, (A 5.)—*Trade*, (B—D 1.)

THE END OF THE SECOND VOLUME.

aste,
oung
nd no
Piers,

it is
g cat-

ade,